In United States Court of Appeals for the District of Columbia Circuit

No. 10044

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN, APPELLANT

v.

THE HONORABLE TOM CLARK, ATTORNEY GENERAL OF THE UNITED STATES ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX

2 *Complaint*

In District Court of the United States for the District of Columbia

No. 4921–'47

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN, 1025 NEWPORT AVENUE, DETROIT 15, MICHIGAN, PLAINTIFF,

v.

THE HON. TOM CLARK, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

THE HON. WATSON B. MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D. C.,

AND

THE HONS. THOMAS G. FINUCANE, ROBERT M. CHARLES, LEIGH L. NETTLETON, ROBERT E. LUDWIG, AND LAURENCE P. SHERFY, AS MEMBERS OF THE BOARD OF IMMIGRATION APPEALS, 939 "D" STREET, N. W., WASHINGTON, D. C., DEFENDANTS.

*Complaint for declaratory judgment and injunction*

Filed December 6, 1947

Plaintiff alleges:

1. This Court has jurisdiction of this action. Such jurisdiction is founded upon the Immigration Act of February 5, 1917, as amended, and particularly Section 25 thereof (8 U. S. C. A. 164),

the Act of June 14, 1934, as amended, known as the Declaratory Judgment Act (28 U. S. C. A. 400), and the Act of June 11, 1946, known as the Administrative Proceduce Act, and particularly Secs. 9 (a) and 10 thereof (5 U. S. C. A. 1008 (a), 1009).

2. At all times herein since June 14, 1940, the Hon. Tom Clark, Attorney General, and his predecessors in office (hereinafter
3 referred to as the Attorney General), have had administrative control of the affairs of the Immigration and Naturalization Service, Department of Justice, and of the deportation proceedings against plaintiff set forth in this complaint. During all of said times the Hon. Watson B. Miller, Commissioner of Immigration and Naturalization, and his predecessors in office (hereinafter referred to as the Commissioner), under the general direction of the Attorney General, have had supervision and direction of the affairs of the Immigration and Naturalization Service, Department of Justice, and of said deportation proceedings. At all times herein the Hons. Thomas G. Finucane, Robert M. Charles, Leigh L. Nettleton, Robert E. Ludwig, and Laurence P. Sherfy, as members of the Board of Immigration Appeals, and their predecessors in office (hereinafter collectively referred to as the Board), have been duly authorized to exercise in behalf of the Attorney General all power possessed by him to suspend deportation of plaintiff.

3. Plaintiff is a native and citizen of Denmark. Plaintiff lawfully entered the United States on or about August 17, 1939, for a period of sixty days as a visitor to visit his relatives in the United States and to attend the World's Fair in New York. The outbreak of World War II prevented the return of plaintiff to Denmark and plaintiff, on or about October 2, 1939, and on or about April 3, 1940, applied for and subsequent to each application received from the Commissioner or officials under his direction an extension of stay within the United States, each such extension having been for a period of six months. Plaintiff since his entry into the United States in August 1939, continuously has remained in the United States. By virtue of the facts stated in this paragraph plaintiff necessarily had to earn a living in the United States, and prior to May 1940, he accepted employment therein.

4. In May 1940, deportation proceedings were commenced against plaintiff by the Commissioner or officials under his direction on the grounds that plaintiff had violated his visitor's status in the United States upon seeking employment
4 therein and had thereby remained in the United States longer than permitted by law. A warrant of deportation to Denmark issued May 15, 1941, against plaintiff, but plaintiff was not deported and said deportation proceedings were subsequently stayed for the duration of World War II.

5. On or about October 12, 1944, plaintiff married Grace Marie Tierno, a native-born citizen of the United States, who is now his wife and is wholly dependent upon him for support. Plaintiff is regularly employed in the United States.

6. On or about June 10, 1946, said warrant of deportation was withdrawn and said deportation proceedings were ordered reopened by the Board to allow plaintiff to submit an application for suspension of deportation under Section 19 (c) of the Immigration Act of February 5, 1917, as amended (8 U. S. C. A. 155 (c)), and pursuant to the reopening of said proceedings further hearings were had. On or about June 27, 1947, an order was entered by the Board denying plaintiff's application for suspension of deportation and requiring plaintiff to depart voluntarily from the United States in lieu of deportation. On September 11, 1947, plaintiff duly requested the Attorney General to review said order of the Board. Said request was treated by the Board as a motion addressed to the Board for reconsideration of the merits of plaintiff's case. On November 10, 1947, the Board made an order denying said request and refusing to reconsider the decision of the Board of June 27, 1947. Plaintiff is now under order of the defendants to depart voluntarily from the United States in lieu of deportation.

7. In the course of said deportation proceedings, the Board has found to exist all facts necessary to authorize the suspension of deportation of plaintiff, including the facts that plaintiff has been a person of good moral character for the past five years and that the deportation of plaintiff would cause an economic detriment to his United States citizen wife, except that the Board has not found that plaintiff is eligible to naturalization in the United States. From the findings of fact, conclusions of law, orders and opinions in said proceedings made by the Board, Commissioner, and officials under their direction, it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States. The Board has concluded that plaintiff is not eligible to naturalization in the United States and, solely and exclusively by virtue of this conclusion, plaintiff's request for suspension of deportation has been denied.

8. Said conclusion that plaintiff is not eligible to naturalization in the United States is predicated solely and exclusively on the fact that plaintiff executed and filed with his Selective Service Board, Local Board #57, Detroit, Michigan, Form DSS 301, which form was entitled "Application by Alien for Relief from Military Service", and was the form used by aliens in applying for such relief. The Board held that said execution and filing of said Form DSS 301 rendered plaintiff ineligible to naturaliza-

tion in the United States by virtue of the Selective Training and Service Act of 1940, Section 3 (a) (50 U. S. C. A. App. 303 (a)).

9. Plaintiff on or about October 16, 1940, duly registered under the Selective Training and Service Act of 1940. On or about March 26, 1942, said Board #57, without request by plaintiff, sent him by mail said Form DSS 301. Plaintiff thereupon proceeded to said Board #57 and requested information from a member thereof regarding the effect of filing said Form DSS 301. Plaintiff on said occasion informed the member of said Board #57 that a warrant of deportation was then outstanding against plaintiff. Said member of said Board #57 thereupon informed and advised plaintiff that by virtue of said deportation warrant plaintiff would be deported whether or not he filed said Form DSS 301, that plaintiff was precluded
6 from obtaining United States citizenship, and that the filing of said Form DSS 301 would have no effect on the deportation proceedings against plaintiff. Plaintiff, relying and acting upon said advice and information, on or about March 30, 1942, executed said Form DSS 301 and filed said form with said Board #57. On or about April 30, 1942, said Board #57 informed plaintiff that he had been placed in Classification 1–A and ordered him to report for induction. Plaintiff duly reported for induction and was thereupon advised by the authorities in charge that he was released and should return home because he had filed said Form DSS 301. Plaintiff remained in Classification 1–A from about April 30, 1942, until September 21, 1945, when he was placed in Classification 4–A. Plaintiff at no time objected to his classification of 1–A. On or about November 19, 1946, plaintiff, shortly after having been advised by counsel and knowing for the first time that said deportation proceedings might be affected by the filing of said Form DSS 301, filed an application with said Board #57 to withdraw said Form DSS 301. Plaintiff would not have filed said Form DSS 301 if plaintiff at the time of filing had known the true significance of such filing in relation to plaintiff's eligibility to naturalization and said deportation proceedings.

10. By reason of the facts set forth in this complaint, neither the Selective Training and Service Act of 1940, Section 3 (a), nor any other provision of law renders plaintiff ineligible to naturalization in the United States, and the defendants and the United States are estopped to assert a claim and to act upon the theory that plaintiff is ineligible to naturalization in the United States.

11. Plaintiff has exhausted all administrative remedies available to him to obtain a determination that he is eligible to naturalization in the United States. Plaintiff is not now in custody.

12. Unless the relief herein prayed for is granted plaintiff, he will be compelled to depart from the United States by defendants and if he does not depart voluntarily will be
7 deported by defendants and thereby will be denied opportunity of becoming a citizen of the United States, and will be deprived of his employment and means of livelihood, and may be forced to separate permanently from his wife, to the irreparable and permanent injury of plaintiff.

Wherefore plaintiff prays:

A. For a Declaratory Judgment declaring and adjudging that plaintiff is eligible to naturalization in the United States, and that the defendants should decide plaintiff's application for suspension of deportation on the basis that plaintiff is eligible to naturalization in the United States.

B. For an injunction enjoining and restraining the defendants and all persons acting under them from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States.

December 6, 1947.

DAVID W. LOUISELL,
SAMUEL SPENCER,
*Attorneys for Plaintiff,*
*1712 H Street NW., Washington 6, D. C.*

SPENCER & LOUISELL,
*1712 H Street NW.,*
*Washington 6, D. C.,*
*Of Counsel.*

* * * * *

8 In United States District Court

*Motion to dismiss*

Filed March 1, 1948

Come now the defendants in the above entitled cause and by their attorney, the United States Attorney, move this Court to dismiss the above entitled cause.

GEORGE MORRIS FAY,
*United States Attorney,*
ROSS O'DONOGHUE,
*Assistant United States Attorney.*

* * * * *

In United States District Court

*[Defendants'] supplemental memorandum of other points and authorities*

Filed May 26, 1948

In addition to the reasons already given in the points and authorities in support of a motion to dismiss in this case is the fact that the complaint does not allege a cause of action upon the merits and even if all the facts alleged therein were proved plaintiff would not be entitled to the relief demanded.

Plaintiff alleges, in brief, that he is otherwise eligible for citizenship, except for the fact that he filled out a certain form during the War in order to obtain exemption from the Draft as a national of a neutral country but that when he did so he was advised by a member of his Draft Board that "he would be deported whether or not he filed said Form DSS 301." The form that was filed by plaintiff with his Draft Board on March 30, 1942, is provided for in the Selective Training and Service Act of 1940, Title 50, U. S. C. A. App., Section 303 (a), as follows:

"* * * *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or
9 naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * *"

This language is conclusive and provides for no exceptions. Surely the mere advice by a member of his Draft Board that his deportation would not be affected by signing it does not constitute an excuse of which this Court can take cognizance. The undoubted fact is that plaintiff filed this form stating that he was a national of a neutral country for the sole purpose of obtaining exemption from the Draft and in order to avoid service in the Armed Forces of this Country during a great war when the very life of the country was at stake. Not only was this clearly his purpose in doing so, since this was the sole object of such form, but he also enjoyed the advantages of the relief from service that was extended as a result of said Draft exemption. During the entire War, while others were making great sacrifices, he was required to make none; yet now demands citizenship in this Country that others have preserved. During the entire War he made no effort to withdraw or cancel the form which protected him

from service. Not until November 19, 1946, more than a year after all hostilities had ceased, did he obtain advice of counsel regarding the true effect of his action and then seek to withdraw Form DSS 301.

In a similar case, *In re Martinez*, decided by Judge Gourley of the District Court for the Western District of Pennsylvania, 73 F. Supp. 101, a petition for naturalization was denied. The facts there were much stronger than in the present case for there, in August, 1942, within two weeks after filing Form DSS 301, petitioner sought to withdraw it and filed an application for voluntary induction. He was then ordered to report for service but was found to be physically not qualified. In order to qualify physically he submitted to a major operation at his own expense and was deferred until March 1, 1943. By the time of his recovery men over thirty-eight were no longer being inducted and so he was not accepted for service. The Court very pertinently said in that case, at page 108:

"In the consideration of a case of this nature, I believe the Court must take notice of the physchological [sic] phenomena which existed during the war as compared with the condition which now exists. Many aliens and individuals who now desire citizenship, during the war pleaded their alien status in bar to the performance of military duty and are now found most vehement in their protestations of loyalty, and of their yearning to take up arms in defense of the country of their adoption. Fighting ceased approximately two years ago, and there is now no longer any danger attached to the tardy proffers of military assistance. When soldiers were needed, however, these fair-weather friends were to be found tying the hands of the local draft boards through pleading their alien status. It is known now, their war records as made up by their questionnaires and applications made from time to time, work an injustice due to the fact that the claims made therein are inconsistent with their real mental attitude. Claim is made that in very considerable numbers of instances, more or less incompetent scriveners had been employed by the draft boards and that said employees did not properly instruct, advise or explain to registrants the meaning and provisions of various forms or questionnaires which were signed. The Selective Service Act, however, placed on the registrant the duty of acquainting himself with all requirements under the Selective Service Act. When the registrant signed and swore to a questionnaire or any other forms which he saw fit to request, that document became his writing, and all responsibility for what may be contained therein was assumed by him.

"[10] It does not seem fair or reasonable to me at this late
11 date than an individual should escape the consequences of declarations against interest contained therein, by any resort to impeachment of what may have been set forth in a questionnaire or in a form which might have been executed. This petitioner was forty-four years of age, had lived in this country for approximately 30 years and should have sufficient intelligence and knowledge to know or inform himself of his various responsibilities and obligations under the law. * * *"

In another case, relied on by the plaintiff here, *In Re Johan August Josefsson*, decided by the Attorney General on June 9, 1947, the Attorney General overruled the decision of the Board of Immigration Appeals because, despite the sympathetic appeal of the case, the Attorney General felt he was bound by the strict provisions of the Selective Training and Service Act of 1940. The petitioner there was a citizen of Finland and signed a Form DSS 301. However, when the War was in progress he appeared before the Board of Immigration Appeals and indicated his willingness to serve in the Armed Forces. When Finland became a co-belligerent with the United States on April 5, 1945, while the War was still in progress, his exemption was cancelled by his local Board and he was ordered to report for induction. He would have served except for the fact that he was rejected because of a physical defect.

In another case similar to the present one, *Benzian* v. *Draft Board No. 65 of Manhattan, New York*, Civil No. 40–773 (not reported), Judge Conger decided on January 13, 1948, that plaintiff was not entitled to have his Form DSS 301 cancelled and that he be declared eligible for citizenship. The case was decided on a motion to dismiss.

These are all of the pertinent cases that can be found. In every one the facts were more sympathetic than in the present one; yet in each case the court found that the plaintiff was bound by his actions in signing and filing Form DSS 301 and was not entitled to citizenship.

In this case, where the plaintiff has reaped the benefits of
12 his actions and has given no valid reason that would excuse his action, he would not be entitled to relief on the basis of the facts alleged on his complaint, and, therefore, it is respectfully submitted that it should be dismissed.

GEORGE MORRIS FAY,
*United States Attorney*,
ROSS O'DONOGHUE,
*Assistant United States Attorney.*

In United States District Court

*Order dismissing cause*

Filed July 29, 1948

This case having come on to be heard upon defendant's motion to dismiss, and the Court having considered the arguments presented orally by both parties as well as the memorandum of points and authorities filed herein, it is by the Court this 29th day of July 1948.

ORDERED that the above-entitled cause be and the same is hereby dismissed.

T. ALAN GOLDSBOROUGH, *Justice.*

In United States District Court

13 *Docket entries*

| | | |
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| 1947 | | |
| Dec. | 6 | Complaint for Declaratory Judgment and Injunction. |
| Dec. | 6 | Summons, with Marshal's return thereon. |
| Dec. | 6 | Summons, with Marshal's return thereon. |
| 1948 | | |
| Feb. | 3 | Stipulation Extending Time to Answer Complaint. |
| Mar. | 1 | Motion to Dismiss by Defendants. |
| Mar. | 1 | Memorandum of Points and Authorities in Support of Motion to Dismiss. |
| Mar. | 10 | Stipulation Extending Time of Plaintiff to File Opposing Points and Authorities. |
| Mar. | 17 | Memorandum of Points and Authorities in Opposition to Motion to Dismiss the Complaint. |
| May | 26 | Supplemental Memorandum of Other Points and Authorities. |
| July | 13 | Supplementary Memorandum of Points and Authorities in Opposition to Motion to Dismiss the Complaint. |
| July | 29 | Order Dismissing Cause. |
| Sept. | 24 | Notice of Appeal. |
| Oct. | 21 | Stipulation for Substitution of Party Defendant. |
| Oct. | 22 | Order for Substitution of Party. |

United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 13, 1949. Joseph W. Stewart, Clerk.

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,044

PEDER KRISTIAN KRISTENSEN, etc., APPELLANT

v.

THE HON. TOM CLARK, et al., APPELLEES

*Motion for Substitution of Party*

Appellant respectfully moves that the Hon. J. Howard McGrath be substituted as a defendant-appellee in the above cause in the place of the Hon. Tom Clark, and that said action be continued and maintained against said J. Howard McGrath in place of said Tom Clark, and as grounds states:

1. The above entitled action is now pending in this Court, awaiting oral argument.

2. During the pendency of said action in this Court one of the persons named as a defendant-appellee, namely the Hon. Tom Clark resigned as Attorney General of the United States and was succeeded in such office, on or about August 24, 1949, by the Hon. J. Howard McGrath, who is now Attorney General of the United States.

3. The same reasons for having originally named said Tom Clark as a defendant are now applicable to said J. Howard McGrath. There is therefore substantial need for substituting said J. Howard McGrath for said Tom Clark and for continuing and maintaining said action against said J. Howard McGrath in place of said Tom Clark.

Wherefore, appellant respectfully moves that said J. Howard McGrath be substituted as a party defendant-appellee to this action in place of said Tom Clark, and that said action be continued

and maintained against said J. Howard McGrath in place of said Tom Clark.

(Signed) DAVID W. LOUISELL,
*David W. Louisell-of Spencer & Louisell,*
*1712 "H" Street, N. W.,*
*Washington, D. C.,*
*Attorneys for Appellant.*

Dated: Washington, D. C., September 13, 1949.

Consented to:

GEORGE MORRIS FAY,
*United States Attorney,*
*Attorney for Appellees. CBM*

GEORGE MORRIS FAY,
*United States Attorney,*
*Attorney for J. Howard McGrath, Attorney General of the United States. CBM*

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 10,044

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

v.

TOM CLARK, Attorney General of the Unites States, et al., APPELLEES

*Order*

On consideration of appellant's motion to substitute J. Howard McGrath, present Attorney General of the United States, as appellee herein in the place and stead of appellee Tom Clark, former Attorney General of the United States, on the ground that said J. Howard McGrath succeeded appellee Tom Clark as Attorney General of the United States on August 24, 1949, and on the ground that there is substantial need for continuing and maintaining this action against the successor to appellee Tom Clark, and it appearing that counsel for the other appellees and for J. Howard McGrath, Attorney General of the United States, consent to said substitution, It is

Ordered by the Court that J. Howard McGrath, Attorney General of the United States, be, and he is hereby, substituted as appellee herein in the place and stead of appellee Tom Clark.

Per Curiam.

Dated September 28, 1949.

United States Court of Appeals for the District of Columbia Circuit. Filed Sep. 28, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 19, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10,044

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

v.

J. HOWARD MCGRATH, Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Argued November 7, 1949. Decided December 19, 1949

*Mr. David W. Louisell*, with whom *Mr. Samuel Spencer* was on the brief, for appellant. *Mr. Thomas M. Cooley, II* also entered an appearance for appellant.

*Mr. Ross O'Donoghue*, Assistant United States Attorney, with whom *Messrs. George Morris Fay*, United States Attorney, and *John D. Lane*, Assistant United States Attorney, were on the brief, for appellees.

*Messrs. Jack Wasserman* and *Irving Jaffe* were on the brief on the behalf of Association of Immigration and Nationality Lawyers, amicus curiae, urging reversal.

Before EDGERTON, MCALLISTER, sitting by designation, and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge:*

Appellant, a citizen of Denmark, entered the United States in August, 1939, under a sixty day temporary visitor's visa to attend the New York World's Fair and to visit his relatives. Caught here by the outbreak of war in Europe, he secured two extensions of

stay—each for six months. Before the expiration of the second six-months' period he obtained employment, allegedly because of economic necessity, only to find that he had thereby violated the terms of his visa. A warrant of deportation issued against him on May 15, 1941, but was stayed because of the impossibility of travel during hostilities. Meanwhile, as an alien subject to a deportation order, he had filed Form DSS 301 ("Application by Alien for Relief from Military Service") on or about March 30, 1942 which resulted in his exemption from military service under the Selective Training and Service Act of 1940, as amended in 1941 (cited hereafter as STSA). He subsequently married an American citizen in 1944 and, in 1946, applied for suspension of deportation under the Immigration Act of 1917, as amended, 54 Stat. 672, 8 U. S. C. § 155(c), which authorizes the Attorney General, in certain circumstances, to suspend deportation of an alien who is not "ineligible to naturalization." The Board of Immigration Appeals denied his application, according to appellant's uncontroverted allegation in his complaint, "solely and exclusively" because appellant's exemption from military service had been secured at the price of a perpetual bar to naturalization. STSA § 3(a), 50 U. S. C. A. App. § 303(a). After exhausting his administrative remedies, appellant sued in the District Court for a declaratory judgment and an injunction against the Attorney General and the Commissioner of Immigration, contending that he was not "residing in the United States" at the time he claimed exemption from service and therefore STSA § 3(a) is inapplicable to him. Appellant was not in custody at the time he brought suit, nor is he today. The District Court sustained defendant's motion to dismiss the complaint.

We think the District Court erred. The initial problem posed is not the availability of review but rather the method by which it may be sought. Is habeas corpus the exclusive remedy to test the legality of a deportation order, as appellee insists, or did the Declaratory Judgment and Administrative Procedure Acts add to the available methods of review?

Before the enactment of these measures, habeas corpus was the sole means of questioning the jurisdiction, fairness and conformity to statute of deportation proceedings.[1] But with the passage of the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. §§ 2201, 2202, the courts were given the power to forestall injury by deciding justiciable cases or controversies at the earliest possible moment. Nor did the use of the declaratory judgment in immigration pro-

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 660, 12 Sup. Ct. 336, 338, 35 L. Ed. 1146, 1149 (1892); *Kabadian* v. *Doak*, 62 App. D. C. 114, 65 F. 2d 202 (1933); *Poliszek* v. *Doak*, 60 App. D. C. 215, 57 F. 2d 430 (1932); *Fafalios* v. *Doak*, 61 App. D. C. 64, 50 F. 2d 640 (1931).

ceedings await the Administrative Procedure Act. In 1938 the Supreme Court sustained this court's decision in *Perkins* v. *Elg*, 69 App. D. C. 175, 180-1, 99 F. 2d 408, 413-4 (1938), mod. and aff'd, 307 U. S. 325, 349-50, 59 Sup. Ct. 884, 896, 83 L. Ed. 1320, 1333-4 (1939), and held the declaratory judgment procedure available to test the legality of the deportation of one claiming to be a citizen of the United States. The interpretation given the new procedure in the *Perkins* case accorded with the purpose of the Act which was, *inter alia*, "To enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari, injunction, prohibition, or habeas corpus." Borchard, *Declaratory Judgments*, 288 (2d ed., 1941).

In view of the decision in *Perkins* v. *Elg*, *supra*, it may well be that even if the Administrative Procedure Act had not been enacted, declaratory judgment procedure would have been available after a deportation order had been entered against an alien. At any rate, the *Elg* case disposes of appellees' assertion that habeas corpus is the exclusive remedy in deportation cases. But § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. § 1009 (1948 Supp.) makes it unnecessary to project that line of authority to the present case. That section makes judicial review available at the suit of

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute * * *.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, *any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)* in any court of competent jurisdiction * * *.

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *." (Emphasis supplied throughout.)

The only exceptions to this sweeping grant of review authority exist where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 5 U. S. C. A. § 1009 (1948 Supp.). Neither exception is satisfied in this case. The immigration statute does not on its face preclude judicial review but merely states that "the decision of the Attorney General shall be final." 8 U. S. C. § 155(a). Such a statutory declaration of finality, which has not precluded review by way of habeas corpus for a considerable number of years, can hardly qualify now as a bar to review

under this statute. *United States ex rel Trinler* v. *Carusi*, 166 F. 2d 457, 461 (C. A. 3d, 1948). The decision of the Attorney General is "final" in much the same sense as was the decision of local boards in selective service cases. The Supreme Court said of the finality accorded the latter, as might well be said of the statute here involved,[2] that it limited the scope of review to questions of conformity to governing statutes and regulations. "Congress chose not to give administrative action under the [Selective Service] Act the customary scope of judicial review which obtains under other statutes." *Estep* v. *United States*, 327 U. S. 114, 122, 66 Sup. Ct. 423, 428-9, 90 L. Ed. 567, 573 (1946). In addition, the legislators expressly recognized that "it has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified." Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945), reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 212 (1946); H. R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *id.* at p. 275; see statement of Rep. Walter, 92 Cong. Rec. 5654 (1946).

Legislative discussion of the second exception, agency action "committed to agency discretion," similarly reveals no intention to bar the sort of review sought herein. For it was made clear to Congress that "questions of law properly presented" were not withdrawn from review. See House and Senate Committee Reports cited *supra*, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 275 (1946); statement of Rep. Walter, 92 Cong. Rec. 5654 (1946). And since there is no doubt that, if appellant were in custody, habeas corpus would lie to examine into the fairness of the proceedings and their conformity to the governing statutes, it seems obvious that no completely unreviewable discretion has been vested in the Attorney General, within the meaning of the "discretion" exception. *United States ex rel Trinler* v. *Carusi*, 166 F. 2d 457, 461 (C. A. 3d, 1948).

In essence, appellees' contention is that the legislative history of the Administrative Procedure Act evidences an intention to freeze the remedies previously used to test each agency's actions. Under

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[2] The finality of the decision would seem to refer to the administrative process rather than to the Attorney General's interpretation of the statute under which he operates. As Mr. Justice Holmes pointed out in an exclusion case, *Gegiow* v. *Uhl*, 239 U. S. 3, 9, 36 Sup. Ct. 2, 3, 60 L. Ed. 114, 118 (1914), "The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. * * * The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact." See *Stark* v. *Wickard*, 321 U. S. 288, 310, 64 Sup. Ct. 559, 571, 88 L. Ed. 733, 748 (1944); Freund, *Administrative Powers Over Persons and Property* 240-1 (1928); Van Vleck, *The Administrative Control of Aliens* 153 (1932).

this view, "*any* applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)" would by an unexplained transference process read "the hitherto applicable procedure" and hence codify the case law holding habeas corpus the exclusive remedy in deportation proceedings.[3] We believe, however, that the language of the statute is clear and that it is satisfied by an interpretation which permits the use of any one of the parenthetically enumerated remedies which fits the circumstances of the case then before the court.

Even if the plain meaning of the statutory language were to be ignored and the legislative history examined for a different content, the search would be fruitless. Only when a "special statutory review" exists under § 10(b) is the use of "any applicable form of legal action" restricted. But examination of the Senate and House reports makes it quite clear that § 10(b)'s reference to "special statutory review" includes only those "common-law forms *referred to and adopted by other statutes* as the appropriate mode of review." House and Senate Committee Reports, cited *supra*, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212-13, 276 (1946). The immigration statute here relevant makes no reference to habeas corpus and hence, that remedy cannot fit within the category of "special statutory review."

The generally liberal attitude of Congress with regard to the declaratory judgment procedure is revealed in the explanation of § 10(b) offered by the Senate Committee on the Judiciary: "Although the declaratory judgment 'proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.' (*Final Report*, Attorney General's Committee, p. 81)." Senate Judiciary Committee Print, June 1945, reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 37 (1946). Even where a "special statutory review" existed, it was not contemplated that declaratory judgment procedure would be foreclosed. Thus, the House and Senate reports state, "Declaratory judgment procedure * * * may be operative *before* statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *Id.* at 276, 212-13. Hence, its use where there is no "special statutory review" would follow *a fortiori*.

Our examination of the legislative history brings us to the same conclusion as that reached by the Third Circuit in the *Trinler* case, *supra*. We hold that the Administrative Procedure Act's judicial review section was not intended to perpetuate preexisting rigidities in the use of extraordinary legal remedies but rather to simplify and

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[3] This view is expressed in the Attorney General's *Manual on the Administrative Procedure Act* 97 (1947).

make more flexible the avenues to judicial relief.[4] Thus viewed, appellant's suit for a declaratory judgment is well taken if he can prove the existence of a justiciable case or controversy.

Our decision in *Kaminer* v. *Clark*, — U. S. App. D. C. —, — F. 2d —, July 11, 1949, does not conflict with anything here decided. In that case, Kaminer sought a declaratory judgment in this district although he was already in custody pursuant to a deportation order in the Southern District of New York. We ruled that "An action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained." In the course of exercising our discretion to deny declaratory relief in that case, nothing was said about its availability in a proper case. Here, declaratory relief is appropriate and since appellant is not in custody in another district, the *Kaminer* rule is necessarily inapplicable.

That this is a case ripe for judicial cognizance is not seriously challenged by the appellees. All that remains for appellant to do is either to depart voluntarily or to go into custody for deportation. To compel him to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country. As Mr. Justice Douglas pointed out in *Estep* v. *United States*, 327 U. S. 114, 125, 66 Sup. Ct. 423, 429, 90 L. Ed. 567, 574 (1946), where the lower court had refused to permit Estep to plead the draft board's lack of jurisdiction over him in defense to a prosecution for failure to report for induction, if habeas corpus were the only remedy available to defendant, it might result in "sending men to jail today when it was apparent that they would have to be released tomorrow." It is true that there are decisions of this court which state that a petitioner in a deportation case would have to enter custody in order to have his rights determined by habeas corpus. See, e. g., *Fafalios* v. *Doak*, 60 App. D. C. 215, 50 F. 2d 640 (1931). But those cases were decided before the enactment of either the Declaratory Judgment Act or the Administrative Procedure Act. In the only post-Declaratory Judgment Act case called to our attention, *Perkins* v. *Elg*, *supra*, this court did

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[4] The Sixth Circuit came to the same general conclusion in *Lincoln Electric Co.* v. *Commissioner of Internal Revenue*, 162 F. 2d 379, 382 (C. A. 6th, 1947). To the same general effect are *United States ex rel Cammarata* v. *Miller*, 79 F. Supp. 643, 646 (S. D. N. Y. 1948); *Scholnick* v. *Clark*, 81 F. Supp. 298, 300 (D. C. D.C. 1948); *Unger* v. *United States*, 79 F. Supp. 281, 286 (E. D. Ill. 1948). Cases stating that the Administrative Procedure Act is merely declaratory of the preexisting law of judicial review are *Valenti* v. *Clark*, 83 F. Supp. 167 (D. C. D. C. 1949) *Olin Industries* v. *NLRB*, 72 F. Supp. 225 (D. Mass. 1947).

not remit petitioner to the habeas corpus remedy but instead granted declaratory relief, which the Supreme Court sustained. Determination of appellant's rights at this juncture detracts not one whit from the administrative process for the Attorney General has already reached his "final" decision and refused to reconsider it.[5] Instead, it satisfies the underlying purpose of the Declaratory Judgment Act which is to decide cases in their incipiency before the law's coercive machinery is brought into play. At the same time, it reinforces the ever-growing concern manifested by the courts for personal liberty and its protection. See *Bridges* v. *Wixon*, 326 U. S. 135, 148, 65 Sup. Ct. 1443, 1449, 89 L. Ed. 2103, 2111-2 (1945).

The only substantive issue before the District Court concerned appellant's contention that the Board of Immigration Appeals ruled incorrectly when it held him "ineligible to naturalization" solely because he filed a claim of exemption from military service under STSA § 3(a). The applicable portion of § 3(a) reads:

> "Except as otherwise provided in this Act * * *, every male citizen of the United States, and *every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States;" 50 U. S. C. A. App. § 303(a).[6]

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[5] Decisions cited by appellees in which this court refused to permit use of the declaratory judgment procedure to interfere with the administrative process are therefore inapplicable. Such cases are *Miles Laboratories* v. *FTC*, 78 U. S. App. D. C. 326, 328, 140 F. 2d 683, 685 (1944); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 69 App. D. C. 333, 338, 101 F. 2d 426, 431 (1938); *Hearst Radio Corp.* v. *FCC*, 73 F. Supp. 308, 309 (D. C. D. C. 1947). Other instances where this court exercised its discretion to deny declaratory relief are *DiBenedetto* v. *Morgenthau*, 80 U. S. App. D. C. 34, 35, 148 F. 2d 223, 225 (1945) (court asked to declare law applicable to a proceeding over which the Court of Claims had complete jurisdiction under the Tucker Act); *Clark* v. *Memolo*, U. S. App. D. C., May 9, 1949 (court asked to vacate sentence already handed down by a District Court in another district).

[6] The amicus curiae brief filed herein and appellant in his reply brief state that Denmark was not a neutral, citing Military Government Law No. 3, Office of Military Government for Germany

To support his request for relief, appellant urges that he was not "residing in the United States" within the meaning of § 3(a) at the time he filed the exemption form, was therefore never liable for military service, and hence his claim of exemption does not bar him from naturalization.

It is axiomatic that residence is not a term of fixed legal definition but takes on shades of meaning according to the statutory framework in which it is found. Beale, *Residence and Domicil*, 4 Iowa L. Bull. 3, 4 (1918); *Raymond* v. *Leishman*, 243 Pa. 64, 89 Atl. 791 (1914). And like domicile, with which it is sometimes said to be synonymous, it is a question to be determined in each case by examination of a party's intention, acts, declarations, the nature of his stay, etc. *Petition of Herschman*, 163 F. 2d 865, 867 (C. A. 7th, 1947); 1 Beale, *Conflict of Laws* 109 (1935); 8 Mertens, *Law of Federal Income Taxation* 252 (1942). But wherever used, the term has an irreducible minimum of meaning. As we shall indicate, it requires at least an abode which is in some degree permanent and is the result of choice. And where aliens are concerned, absent unusual circumstances, it also requires the consent of the sovereign. Appellant's continued presence here was in no sense permanent, was not the result of choice, and was under the express dissent of the sovereign.

Appellant's permit to enter this country as a "temporary visitor" was in the nature of a conditional grant from the sovereign,[7] subject to revocation the instant he violated the designated status. *Schacht* v. *Young*, 164 F. 2d 882, 883 (C. A. 5th, 1947). In *Leonhard* v. *Eley*, 151 F. 2d 409, 410 (C. A. 10th, 1945), the court took note of the conditional nature of the permission in a case involving STSA § 3(a) when it said that "Aliens residing in the United States, *so long as they are permitted by the government to remain therein*" (emphasis

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(U. S.), Title 23, enacted November 15, 1944, and conclude therefrom that appellant was not covered by STSA § 3(a). It appears, however, that the Selective Service Board classed Denmark as a neutral within this Act beginning March 16, 1942. Local Board Memorandum No. 112. No conclusive determination of Denmark's status during the period pertinent to this case has been made by the State Department. But since we decide the case on other grounds, consideration of this issue is unnecessary.

[7] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, 12 Sup. Ct. 336, 338, 35 L. Ed. 1146, 1149 (1892); *Johannessen* v. *United States*, 225 U. S. 227, 240, 32 Sup. Ct. 613, 616, 56 L. Ed. 1066, 1071 (1912); *Lai To Hong* v. *Ebey*, 25 F. 2d 714, 716 (C. A. 7th, 1928). See *In re Gaffney's Estate*, 252 N. Y. Supp. 649 (Surr. Ct., 1931), for a holding that a "temporary visitor" was not an "inhabitant" under a state law entitling only "inhabitants" to letters of administration. The court held the meaning of "inhabitant" to be "coordinate with that of resident." *Id.* at 652.

supplied) are entitled to the protection of the sovereign and hence are liable for military service. The inference to be drawn, although not made explicit by the court, is that without such permission to remain, there would be no liability to service under this Act. Thus, when appellant violated his visitor's status by accepting employment and a deportation warrant issued against him, any prospect of his stay developing what it lacked, the limited degree of permanence required for residence, was foreclosed to him. See Beale, *Residence and Domicil*, 4 Iowa L. Bull. 3 (1918).

This view accords with the way in which residence is generally treated under the immigration laws. The nature of an alien's stay in this country under those statutes takes its meaning from the terms of the original permission to enter and its continued recognition by the sovereign. Thus, time spent here illegally, as after the expiration or revocation of a temporary visa, is not credited to the five year residence requirement prerequisite to naturalization. *United States* v. *Kreticos*, 59 App. D. C. 305, 307, 40 F. 2d 1020, 1022 (1930); *In re Wieg*, 30 F. 2d 418 (S.D. Texas, 1929); *Ex Parte Domenici*, 8 F. 2d 366, 367 (D.Mass., 1925). The reasoning of Mr. Justice Holmes in *Kaplan* v. *Tod*, 267 U. S. 228, 230, 45 Sup. Ct. 257, 69 L. Ed. 585, 587 (1925), which dealt with a child within a class barred from entry by statute, illustrates that an alien's physical presence alone is not conclusive of residence: "until she legally landed [appellant] 'could not have dwelt within the United States' [within the meaning of the Act] * * *. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still, in theory of law, at the boundary line, and had gained no foothold in the United States."

In addition to the fact that the sovereign had withdrawn its consent by issuing a deportation order, there is the additional circumstance that appellant's continued presence in this country between the time of the order and his claim of exemption was the result of the outbreak of war in Europe. Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence. Thus, as Judge Learned Hand pointed out, "there is substantial unanimity that, however construed in a statute, residence involves some choice * * * and that presence elsewhere through constraint has no effect upon it." *Neuberger* v. *United States*, 13 F. 2d 541, 542 (C. A. 2d, 1926). Cf. *Millett* v. *Pearson*, 143 Minn. 187, 173 N. W. 411, 412 (1919).

Clearly, at the time he registered and subsequently filed Form DSS 301, appellant had been deprived of the volition necessary to residence because proceedings against him had been completed and he was awaiting the purely ministerial act of deportation. An alien similarly situated was held not to be a "resident" for the purpose of

taxation in *Florica Constantinescu* v. *Commissioner of Internal Revenue*, 11 Tax Ct. 36 (1948). In that case, the petitioner, a Roumanian citizen residing in France, had originally been admitted to the United States in 1939 under a temporary visitor's visa. During the entire taxable year involved, she was the subject of a deportation order whose execution had been stayed because of war conditions. Under such circumstances, the court concluded that although "during all of the time here in question she was physically present in the United States, * * * mere physical presence in a foreign country, even though it is considerably prolonged, is not of itself sufficient to establish residence." *Id.*, at 42-3. The Tax Court's reasoning is persuasive because of the similarity in origin of the obligation to pay taxes and the obligation of military service. Both inhere in the allegiance owed to a protecting sovereign.

Appellant's lack of choice is further illustrated by the fact that even voluntary departure pursuant to the deportation order was unavailable to him because Denmark was under German occupation. Under similar facts, a person who left the United States to travel in Germany and was caught there by the course of war, was held not to be "resident within" Germany within the meaning of the Trading with the Enemy Act. *McGrath* v. *Zander*, — U. S. App. D. C. —, — F. 2d —, Oct. 10, 1949; *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. A. 2d, 1926).

In all the cases involving liability for military service under § 3(a) of the Selective Training and Service Act which have come to our attention, the aliens held to be "residing in the United States" had lived in this country for long periods of time, were not here under temporary visitor's visas, and no deportation orders were involved.[8] The only case holding that a "temporary visitor" is "residing in the United States" within the terms of § 3(a) is *Benzian* v. *Godwin*, 168 F. 2d 952 (C. A. 2d, 1948), cert. den. 335 U. S. 886, 69 Sup. Ct. 235 (1948), in which no deportation order had been issued. Judge Frank, speaking for the court, held that when Congress amended STSA § 3(a) in 1941 to make liable for service "all male persons

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[8] See, e. g., *Cervantes* v. *United States*, 163 F. 2d 294 (C. A. 9th, 1947); *United States* v. *Lamothe*, 151 F. 2d 340 (C. A. 2d, 1945); *Albany* v. *United States*, 152 F. 2d 266 (C. A. 6th, 1945); *Leonhard v. Eley*, 151 F. 2d 409 (C. A. 10th, 1945); cf. *In re Martinez*, 13 F. Supp. 101 (W. D. Pa. 1947); *Petition of Bartenbach*, 82 F. Supp. 649 (W. D. Pa. 1949) (entered for *permanent* residence in 1940). In *Ex Parte Asit Ranjan Ghosh*, 58 F. Supp. 851, 854 (S. D. Cal. 1944), one who entered in 1940 for the purpose of university study and was ordered inducted in 1944 was held not to be "residing in the United States" and, therefore, not liable for military service.

residing in the United States," [9] it adopted the Attorney General's construction of that phrase as previously used in § 2 in connection with persons subject to *registration*. That construction had been to the effect that for *registration* purposes, persons here under temporary visas were "residing in the United States." 39 Op. Atty. Gen. 504 (Oct. 11, 1940). Without examining into the merits of the residence question, the court in the *Benzian* case deferred to the rule of statutory construction that Congressional reenactment of an administratively interpreted statute evidences Congressional approval of that interpretation, and extended the rule to use of the old phrase in a new context. That rule, however, had its origin in situations where a statutory provision had been interpreted by an agency over a long period of years and Congress then reenacted the same provision.[10] In contrast, as already indicated, we are confronted with a transposition of a phrase from one context in the statute to another, with no direct evidence whatsoever that Congress was aware of the Attorney General's construction of the phrase in the first context.[11] As the Supreme Court said in *Girouard* v. *United States*, 328 U. S. 61, 69-70, 66 Sup. Ct. 826, 830, 90 L. Ed. 1084, 1090 (1946), where it overruled its own construction of a statute which had come to the attention of Congress several times and the construed portion had been reenacted, "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of [these] * * * cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of these cases." See concurring opinion of Justice Rutledge in *Cleveland* v. *United States*, 329 U. S. 14, 22-4, 67 Sup. Ct. 13, 17-8, 91 L. Ed. 12, 18-9. Congressional reenactment without express consideration or reference cannot give controlling weight to an originally erroneous administra-

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[9] Originally, the Act made all "male persons residing in the United States" subject to registration but only those who had declared their intention of becoming citizens were liable to service.

[10] *Crane* v. *Commissioner of Internal Revenue*, 331 U. S. 1, 8, 67 Sup. Ct. 1047, 1051-2, 91 L. Ed. 1301, 1307 (1947); see Crawford, *Statutory Construction* 439 (1940).

[11] No reference is made to the Attorney General's opinion in the Conference Report of the House and Senate on the 1941 amendment, H. R. Rep. No. 1554, 77th Cong., 1st Sess. (1941).

tive interpretation.[12] The Attorney General's opinion relied on in the *Benzian* case cites us to no authority in support of its conclusion that a "temporary visitor" is necessarily "residing in the United States."

We are unable to agree that Congressional use of a term having as rich a lay and legal meaning as "residing" was intended to include all "temporary visitors," regardless of the surrounding circumstances, or their own attitude and that of our government toward their presence here. Cf. Mertens, *op. cit. supra* at 249-50. If Congress had meant to make liable to military service "all male persons in the United States," we do not think that it would have inserted the requirement that such persons be "residing."

We hold that, absent any showing of acts or declarations indicating an intention to remain at the time the form was filed, the immigration authorities erroneously construed "residing in the United States" when they held it applicable to an alien in this country under a temporary visitor's visa whose deportation had been ordered and then stayed because of war. Since, under the facts taken to be admitted by the pleadings, appellant was not a resident at the time he filed Form DSS 301, the claim of exemption was without effect and he was not "ineligible to naturalization" solely because of such filing.[13] Of course, our conclusion does not obviate the requirement that appellant otherwise comply with the naturalization statutes.

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[12] *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, 280, 49 Sup. Ct. 133, 137, 73 L. Ed. 322, 377 (1927); *Hanson* v. *Landy*, 24 F. Supp. 535, 540 (D. Minn., 1938); *Allen* v. *Long*, 272 Mass. 502, 172 N. E. 643 (1930); Cf. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 134, 56 Sup. Ct. 397, 400, 80 L. Ed. 528, 531 (1936).

[13] The government suggests that appellant, by filing Form DSS 301, was estopped from later challenging its validity as applied to him. But obviously, as Judge Frank pointed out in the *Benzian* case *supra* at 956, "appellant's status as resident or non-resident was unaffected by the filing of that form." Nor does the fact that a procedure for determination of residence (not available to appellant) had been established by regulation in February, 1942 (pursuant to 50 U. S. C. A. App. § 305(a) alter the situation; that procedure was available only to those aliens who invoked it within three months after their entry. Since appellant had entered in August, 1939, and did not claim exemption until about March 30, 1942, which was thirty-one months rather than three months after entry, he could not then get any administrative interpretation. Not until 1945 was any provision made for extension of the three-month limitation. Moreover, the regulations contain nothing to aid in the determination of

The judgment below is reversed and the cause remanded to the District Court for appropriate action in accordance with this opinion.

Reversed.

United States Court of Appeals for the District of Columbia Circuit. Filed Dec. 19, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit
October Term, 1949

No. 10,044

PETER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN, APPELLANT

vs.

J. HOWARD MCGRATH, Attorney General of the United States, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, MCALLISTER, sitting by designation, and BAZELON, Circuit Judges.

*Judgment*

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for appropriate action in accordance with the opinion of this Court.

Per Circuit Judge BAZELON.

Dated December 19, 1949.

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whether a person in appellant's position was "residing in the United States." They merely specify that persons in certain categories are not to be deemed "residing," leaving the staus of other persons to be fixed by means of an "Application for Determination of Residence" under Regulation 611.13(7) Title 32, Code Fed. Regs. § 611.13 (1943 Supp.). But, as already indicated, such a determination was unavailable to appellant at the time he filed Form DSS 301.

United States Court of Appeals for the District of Columbia Circuit. Filed Mar. 14, 1950. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 10,044

PEDER KRISTIAN KRISTENSEN, etc.

v.

J. HOWARD MCGRATH, Attorney General of the United States, et al.

*Designation of Record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Motion to substitute.
3. Order substituting J. Howard McGrath, Attorney General, in the place and stead of Tom C. Clark.
4. Opinion.
5. Judgment.
6. This designation.
7. Clerk's certificate.

PHILIP B. PERLMAN,
*Solicitor General,*
*Counsel for Appellee.*

March 14, 1950

*Certificate of Service*

I hereby certify that I have this day served a copy of the Designation of Record on Messrs. Davis W. Louisell and Samuel Spencer by mailing copies to them at their business address, 1712 H Street, N.W., Washington, D. C.

PHILIP B. PERLMAN,
*Solicitor General.*

Dated at Washington, D. C., this 14th day of March, 1950.

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 29, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and of the proceedings in the said Court of Appeals, as designated by counsel, in the case of: Peder Kristian Kristensen, also known as Peter Kristen Kristiansen, also known at Peter Christensen, Appellant, v. J. Howard McGrath, et al., Appellees, No. 10,044, January Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this Eighteenth day of March, A. D. 1950.

JOSEPH W. STEWART,
*Clerk of the United States Court of Appeals for the District of Columbia Circuit.*

In the Supreme Court of the United States, October Term, 1949

No. —

J. HOWARD MCGRATH, Attorney General of the United States, et al.,
PETITIONER

v.

PEDER KRISTIAN KRISTENSEN, ETC.

*Stipulation*

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the designation of Record filed by the Petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the United States Supreme Court the entire transcript of record

in the United States Court of Appeals for the District of Columbia Circuit, and it is agreed that the parties hereto may refer in their briefs and on oral argument to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
*Solicitor General.*
*Counsel for Petitioner.*
DAVID W. LOUISELL,
*Counsel for Respondent.*

March 14, 1950.

Supreme Court of the United States, October Term, 1949

No. —

J. HOWARD MCGRATH, Attorney General of the United States, et al.,
PETITIONERS

vs.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

*Order Extending Time to File Petition for Writ of Certiorari*

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 27th, 1950.

(S.) FRED M. VINSON,
*Chief Justice of the United States.*

Dated this 17th day of March, 1950.

Supreme Court of the United States

*Order allowing certiorari*

Filed May 15, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 734

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

*v.*

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 5 |
| Reasons for granting the writ | 9 |
| Conclusion | 27 |


## CITATIONS

Cases:


| | |
|---|---|
| *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 | 17 |
| *Ahrens* v. *Clark*, 335 U. S. 188 | 18, 21 |
| *Azzolini* v. *Watkins*, 172 F. 2d 897 | 20 |
| *Bata Shoe Co. Inc.* v. *Perkins*, 33 F. Supp. 508 | 12 |
| *Benzian* v. *Godwin*, 168 F. 2d 952, certiorari denied, 335 U. S. 886 | 26 |
| *Bridges* v. *Wixon*, 326 U. S. 135 | 14, 20, 23 |
| *Coffman* v. *Breeze Corps*, 323 U. S. 316 | 17 |
| *Connor* v. *Miller*, 178 F. 2d 755 | 20, 21 |
| *Cox* v. *United States*, 332 U. S. 442 | 11 |
| *Darabi* v. *Northrup*, 54 F. 2d 70 | 12 |
| *Eagles* v. *Samuels*, 329 U. S. 304 | 10 |
| *Eccles* v. *Peoples Bank*, 333 U. S. 426 | 18 |
| *Estep* v. *United States*, 327 U. S. 114 | 10, 11, 13, 22 |
| *Fafalios* v. *Doak*, 50 F. 2d 640, certiorari denied, 284 U. S. 651 | 11 |
| *Falbo* v. *United States*, 320 U. S. 549 | 25 |
| *Federation of Labor* v. *McAdory*, 325 U. S. 450 | 17 |
| *Gibson* v. *United States*, 329 U. S. 338 | 11 |
| *Hiatt* v. *Compagna*, 178 F. 2d 42 | 13 |
| *Impiriale* v. *Perkins*, 66 F. 2d 805, certiorari denied, 290 U. S. 690 | 12 |
| *Kabadian* v. *Doak*, 65 F. 2d 202, certiorari denied, 290 U. S. 661 | 11 |
| *Kaminer* v. *Clark*, 177 F. 2d 51, certiorari denied, 338 U. S. 873 | 18 |
| *Ludecke* v. *Watkins*, 335 U. S. 160 | 13 |
| *Ng Fung Ho* v. *White*, 259 U. S. 276 | 19 |
| *Perkins* v. *Elg*, 307 U. S. 325 | 19 |
| *Podovinnikoff* v. *Miller*, decided January 30, 1950 | 20, 21 |
| *Poliszek* v. *Doak*, 57 F. 2d 430 | 11 |

Cases—Continued Page

*Rash* v. *Zurbrick*, 6 F. Supp. 390 ..... 11
*Solesbee* v. *Balkcom*, No. 77, this Term, decided February 20, 1950 ..... 13
*Sunal* v. *Large*, 332 U. S. 174 ..... 10, 13
*Tisi* v. *Tod*, 264 U. S. 131 ..... 10
*Trinler* v. *Carusi*, 166 F. 2d 457 ..... 20
*United Public Workers* v. *Mitchell*, 330 U. S. 75 ..... 17
*Vajtauer* v. *Commissioner*, 273 U. S. 103 ..... 10
*Weddeke, United States ex rel* v. *Watkins*, 166 F. 2d 369, certiorari denied, 333 U. S. 876 ..... 14
*Wong Yang Sung* v. *McGrath*, No. 154, this Term, decided February 20, 1950 ..... 10

Statutes:

Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U. S. C. 1009 ..... 4, 12–13, 14, 16
Declaratory Judgment Act, 28 U. S. C. 2201 ..... 3, 17
Immigration Act of 1917, 39 Stat. 889, Section 19 as amended ..... 24
8 U. S. C. 155 (a) ..... 2, 10
8 U. S. C. 155 (c) ..... 3
Nationality Act of 1940, Section 503, 54 Stat. 1137, 1171 8 U. S. C. 903 ..... 19
Selective Training and Service Act of 1940, Section 3 (a), 54 Stat. 885, as amended, 50 U. S. C. App. 303 ..... 5, 26
28 U. S. C. 2243 ..... 22

Miscellaneous:

Annual Report, Commissioner of Immigration and Naturalization (1948), p. 23 ..... 21
*Attorney General's Manual on the Administrative Procedure Act*, p. 93 ..... 16
Opinion of the Attorney General, 39 Op. Atty. Gen. 504 .. 26
Sen. Doc. 248, 79th Cong., 2d sess:
P. 83–84 ..... 16
P. 224–229 ..... 16
P. 369 ..... 15, 21
P. 406–407 ..... 16
P. 415 ..... 16

# In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 34

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

*v.*

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the order of the District Court for the District of Columbia, which dismissed for lack of jurisdiction respondent's complaint for a declaratory judgment and an injunction.

## OPINION BELOW

The opinion of the Court of Appeals (R. 17–29) has not yet been reported. The District Court wrote no opinion (see R. 12).

## JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 29). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for a writ of certiorari was extended to and including March 27, 1950 (R. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether a final deportation order is subject to direct review under Section 10 of the Administrative Procedure Act, in lieu of a proceeding in habeas corpus.

2. Whether a final deportation order may be directly questioned in a declaratory judgment proceeding, in lieu of a proceeding in habeas corpus.

3. If either of such methods of review is available in this case, then there is presented the further question whether the court below erred in finding respondent eligible for the grant of discretionary relief to bar deportation despite his having applied for and obtained, as a neutral alien, relief from military service during World War II.

## STATUTES INVOLVED

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation

"shall, upon the warrant of the Attorney General, be taken into custody and deported * * *. In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

Section 19 (c) of the same Act, 8 U. S. C. 155 (c), specifies that in the cases of certain categories of deportable aliens, "the Attorney General may * * * suspend deportation of such alien if not * * * ineligible to naturalization * * *." Under the terms of the statute, such suspension of deportation can result in legalization of the applicant's residence in the United States only if Congress thereafter passes a concurrent resolution favoring such suspension of deportation.

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.
>
> (c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. 303, provided in part:.

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

## STATEMENT

Respondent, an alien who is the subject of deportation proceedings, brought this action, initiated by a "Complaint for Declaratory Judgment and Injunction" (R. 2–7), in the District Court for the District of Columbia, against the Attorney General, the Commissioner of Immigration and Naturalization, and the members of the Board of Immigration Appeals. The suit was brought under the Declaratory Judgment Act and the Administrative Procedure Act (R. 2). The

complaint makes the following allegations (R. 3–6): Respondent, a Danish citizen, entered the United States as a temporary visitor on August 17, 1939. He was admitted for a period of sixty days to visit relatives and attend the New York World's Fair. The outbreak of the war in Europe prevented his departure and he obtained two extensions of stay, each for six months. Deportation proceedings were commenced against him in May, 1940, on the ground that he had violated his visitor's status by obtaining employment in the United States and had thereby remained in the United States longer than permitted by law. On May 15, 1941, he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. He has continued to reside in the United States since then, and married an American citizen on October 12, 1944 (R. 3–4).

Respondent registered under the Selective Training and Service Act of 1940. However, he executed and filed an application for relief from military service as a neutral alien (form DSS 301) on or about March 30, 1942. This was done, the complaint alleges, after he had been informed by a member of his local Selective Service board that since he was already subject to deportation, the signing of form DSS 301 would have no effect on his deportation and that he was precluded from obtaining American citizenship (R. 5–6). He asserts that he would not have filed

the form if he had known of its effects on his deportation and eligibility for naturalization (R. 6). His request for exemption was honored, and he never was called upon to perform military service for the United States (R. 6). After learning that the filing of form DSS 301 might affect his deportation, he applied, in November 1946, to withdraw his application for exemption (R. 6).

The unexecuted warrant of deportation which had been outstanding against him since 1941 was withdrawn on or about June 10, 1946. The deportation proceeding was reopened to permit respondent to apply for suspension of deportation on the basis of his marriage to an American citizen. After consideration of the evidence adduced in connection with the application for suspension of deportation, the Board of Immigration Appeals, on June 27, 1947, denied the plea for suspension of deportation on the ground that respondent's application for relief from military service as a neutral alien had, under the requirements of the Selective Training and Service Act, rendered him ineligible for naturalization, and consequently disqualified him for the discretionary benefits under the statute authorizing suspension of deportation. (See *supra*, pp. 3, 5.) However, the Board of Immigration Appeals directed that he be permitted to depart from the United States voluntarily in lieu of deportation, if he so desired

(R. 4). A motion for reconsideration of that order was rejected. The complaint further alleges that the Board of Immigration Appeals has "found to exist all facts necessary to authorize the suspension of deportation of plaintiff," except for the finding that he is ineligible for naturalization, and that "it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States" (R. 4–5). The Board's view of this statutory requirement, as applied to this case, is asserted to be erroneous (R. 5–6).

Respondent has not departed from the United States, nor has he been required to surrender under the order of deportation; he is not in custody (R. 6). He prays for a declaratory judgment that he is eligible for naturalization and that the petitioners should decide his application for suspension of deportation on that basis; he also seeks an injunction restraining petitioners "from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States" (R. 7).

Petitioners moved to dismiss (R. 8), and the District Court granted the motion (R. 12). On appeal, that order was reversed. The Court of Appeals concluded that an alien subject to deportation, who is not in custody, may challenge the deportation order and proceedings under the Ad-

ministrative Procedure Act, and probably also under the Declaratory Judgment Act. In exercising its asserted power to review the administrative determination in this proceeding, the court held that since respondent was subject to an order of deportation at the time he applied for relief from military service, he was not then "residing in the United States," for the purpose of the Selective Training and Service Act, and his application for relief from military service was therefore a nullity since he was not actually subject to such service. Because of this holding, the court found it unnecessary to require a hearing on respondent's allegations as to the information given to him by the local Selective Service board concerning the effect of his filing of the exemption form.

## REASONS FOR GRANTING THE WRIT

### I

If the views of the Court of Appeals are correct, an alien dissatisfied with an order of deportation may contest it by direct review in the courts, under the Administrative Procedure or Declaratory Judgment Acts, before he is taken into custody under the order. We believe the assumptions implicit in that position cannot be supported, and that such a far-reaching and significant departure from the established acceptance of habeas corpus as the only remedy open to an alien subject to deportation should be reviewed by this Court.

1. Congress has entrusted the conduct of depor-

tation proceedings to the Attorney General and has unqualifiedly commanded that his order in such proceedings "shall be final." Sec. 19 (a), Immigration Act of 1917, 8 U. S. C. 155 (a), *supra*, p. 3. The determinations in such proceedings are entirely administrative, and are not subject to "the customary scope of judicial review which obtains under other statutes." *Estep* v. *United States*, 327 U. S. 114, 122, 123; see *Sunal* v. *Large*, 332 U. S. 174, 177 fn. 3. It is indisputable, of course, that an alien in custody under an order of deportation can question the propriety of the restraint through a writ of habeas corpus. *Wong Yang Sung* v. *McGrath*, No. 154, this Term, decided February 20, 1950. But the scrutiny in such cases is collateral rather than direct. And the court's inquiry is limited to determining whether the order was issued in conformity with law, after a fair hearing, and on the basis of evidence which supports the finding. *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106; *Tisi* v. *Tod*, 264 U. S. 131, 133. In other words, the judicial inquiry is solely into the jurisdiction of the detaining immigration authorities. *Estep* v. *United States*, *supra*. Such circumscribed opportunity for court review is equivalent to that available in other situations where administrative decisions are expressly given finality by statute, such as determinations of selective service boards. *Estep* v. *United States*, *supra*; *Eagles* v. *Samuels*, 329 U. S. 304, 311, 312.

Prior to the Administrative Procedure Act and the Declaratory Judgment Act, the courts held, without exception, that habeas corpus was the only remedy for questioning the deportation process.[1] Thus, in *Fafalios* v. *Doak*, 50 F. 2d 640 (C. A. D. C.), certiorari denied, 284 U. S. 651, the court concluded that a bill in equity to cancel an order of deportation and to require discretionary action was not a proper remedy. The court found that a writ of habeas corpus, after the alien was in custody, afforded the only appropriate method of relief since

> the writ will accord him an adequate and complete remedy. Should appellant's contention be sustained, every alien, by merely giving bail, might test the legality of the deportation proceedings through a bill in equity in the District of Columbia, instead of through a writ of habeas corpus in the proper district.

A like holding rejecting a bill in equity is found in *Rash* v. *Zurbrick*, 6 F. Supp. 390 (E. D. Mich.). Similarly, in *Poliszek* v. *Doak*, 57 F. 2d 430 (C. A. D. C.), and *Kabadian* v. *Doak*, 65 F. 2d 202 (C. A. D. C.), certiorari denied, 290 U. S. 661, petitions for writs of prohibition were re-

[1] Compare the decisions holding that collateral challenge of final orders of Selective Service may be made in criminal prosecutions for noncompliance, as well as in habeas corpus. *Estep* v. *United States*, 327 U. S. 114; *Gibson* v. *United States*, 329 U. S. 338; *Cox* v. *United States*, 332 U. S. 442. Those cases presented exceptional considerations, not found in the instant case.

jected on the ground that habeas corpus was the proper remedy. A bill in equity seeking a declaratory judgment, prior to the Declaratory Judgment Act, likewise was found inappropriate. *Darabi* v. *Northrup,* 54 F. 2d 70 (C. A. 6). See also *Impiriale* v. *Perkins,* 66 F. 2d 805 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Bata Shoe Co. Inc.* v. *Perkins,* 33 F. Supp. 508, 509 (D. D. C.).

2. The court below was of the view that the Administrative Procedure Act had modified these rulings and that relief under that statute is now appropriate to forestall deportation. It relied most heavily upon Section 10 of the Act, 5 U. S. C. 1009, describing it as a "sweeping grant of review authority" which authorized a declaratory re-examination of deportation orders (R. 19). We do not read the statute as conferring such broad authority, or as designed to repeal or modify the provisions of the immigration laws which invest with finality the Attorney General's order in a deportation case, or as providing a substitute for a habeas corpus proceeding in deportation cases.

Section 10 of the Administrative Procedure Act does not purport to authorize unlimited judicial review of every executive or administrative determination. While subsection (a) (*supra,* p. 4) is couched in broad language and permits review by any person "aggrieved," its prescriptions obviously must be read in harmony with the

introductory language of Section 10 and the limitations found in other parts of the same section. The clause which prefaces the entire section declares that its provisions apply "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *." Judicial review may be precluded expressly or impliedly, and such preclusion may extend to all or part of the administrative determination. See *Ludecke* v. *Watkins*, 335 U. S. 160, 163–164. In our view, direct judicial review of a deportation order, such as the review contemplated by the Administrative Procedure Act, is precluded by the immigration statute's flat declaration that the Attorney General's decisions are final. The existence of the habeas corpus remedy does not alter this conclusion, for such a collateral challenge to a deportation order—testing the jurisdiction of the administrative agency—is not the type of allowable "judicial review" contemplated by the introduction to Section 10. See *Sunal* v. *Large*, 332 U. S. 174, 177, fn. 3; *Estep* v. *United States*, 327 U. S. 114, 122, 123.[2]

[2] In addition, we believe that in the instant case such limitation of review is fortified by the second stated exception which relates to "agency action * * * by law committed to agency discretion." The application for suspension of deportation is addressed to the Attorney General's discretion. It is comparable to the exercise of executive or judicial clemency following conviction for crime. See *Solesbee* v. *Balkcom*, No. 77, this Term, decided February 20, 1950; *Hiatt* v. *Compagna*, 178 F. 2d 42 (C. A. 5).

Moreover, the body of Section 10 indicates that habeas corpus is still the proper method for attacking an administrative decision of deportation. Section 10 (b) specifies, in cases like the instant one where there is no special statutory review proceeding, that the form of relief shall be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction," and Section 10 (c) provides for judicial review, where none is provided by statute, of "every final agency action for which there is no other adequate remedy in any court." In immigration matters, habeas corpus has long been the only "applicable form of legal action," and its adequacy has been judicially attested. See *Bridges* v. *Wixon,* 326 U. S. 135; supra, pp. 10–12. Reading these provisions of the Procedure Act in their entirety, and in conjunction with the immigration statutes, as we are required to do by the introductory clause of Section 10, it seems proper to conclude that deportation orders retain such finality as they previously had, and that they may not be challenged except collaterally in habeas corpus proceedings.[3]

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[3] To the extent that judicial inquiry may be had in attempts to challenge the exercise of discretion in denying suspension of deportation, it can be invoked in a habeas corpus attack upon the deportation order. *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333

The legislative history of the Administrative Procedure Act strengthens this view that Section 10 was not designed to alter existing modes of judicial review. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment (Sen. Doc. 248, 79th Cong., 2d Sess., p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review.

Another significant comment, also prior to approval of the legislation, is found in the following interpretive statement of the Attorney General, placed in the Congressional Record on May

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U. S. 876. Thus, the review sought in the instant case would have been equally available in habeas corpus.

Although neither the complaint nor the decision of the court below in the present suit purports to offer a direct challenge to the deportation process, it seems evident that their thrust is aimed directly at the order of deportation. The application for suspension of deportation is made in the deportation proceeding, and seeks to forestall deportation. When that application is rejected, as it was in the instant case, deportation is ordered. The court's intervention has the effect of preventing execution of the order of deportation.

25, 1946 by Representative Hobbs (Sen. Doc. 248, *supra,* p. 415):

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

See also Sen. Doc. 248, *supra,* pp. 83–84, 224–229, 406–407, and *Attorney General's Manual on the Administrative Procedure Act,* p. 93.

In sum, we believe that Section 10 of the Administrative Procedure Act was not intended to supersede the principles of judicial scrutiny which had been developed for deportation cases. The language of the statute, its legislative history, and the contemporaneous expressions negate such an assumption. On the contrary, it seems

evident that this section merely proclaims a codification of existing modes of review. Only when no adequate remedy was formerly provided does Section 10 purport to enlarge the method of obtaining judicial examination.

3. The court below also calls upon the Declaratory Judgment Act to buttress its holding that Section 10 of the Administrative Procedure Act permits a suit of this type (R. 18–19, 21–22). But in prescribing for relief to be granted by a court in "a case of actual controversy within its jurisdiction", the Declaratory Judgment Act manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to qualify for the benefits of that statute, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.,* 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell,* 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound discretion of the court, which should be exercised only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered" (*Federation of Labor* v. *McAdory,* 325 U. S. 450, 462), and especially where governmental action is involved this discretion must be cautiously exer-

cised in the public interest. See *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431, 434.

For these reasons, and in the light of the general acceptance of habeas corpus as the proper vehicle, it has been supposed, at least until the decision in the instant case, that the declaratory judgment action was not a proper method for challenging an order of deportation. At least in form, and perhaps also in substance, such a suit would constitute a direct attack upon the Attorney General's order which the immigration statute directs "shall be final". Habeas corpus affords a proper remedy, and no real need for the additional procedure can be shown. *Supra,* pp. 10–12; *infra,* pp. 22–23. On the other hand, opening this door would burden the courts in the District of Columbia with a large volume of litigation which could be decided more expeditiously and completely in habeas corpus proceedings conducted at the real situs of the controversy.[4] These are reasons which should impel the courts to refuse to entertain the action for a declaratory judgment, in the exercise of sound discretion. *Kaminer* v. *Clark,* 177 F. 2d 51 (C. A. D. C.), certiorari denied, 338 U. S. 873.[5] They also argue

[4] Cf. *Ahrens* v. *Clark,* 335 U. S. 188; see *infra,* pp. 21–22.

[5] The court below attempted to distinguish its own decision in the *Kaminer* case on the ground that it involved a person already in custody, hence habeas corpus was an exclusive remedy. This does not seem an adequate basis for differentiation, since habeas corpus would become equally available, in the present situation, as soon as the alien is taken into custody.

against the availability of the remedy itself, regardless of discretion.

We cannot agree with the court below that *Perkins* v. *Elg*, 307 U. S. 325, furnishes any support for the relief sought by respondent. The Court there passed upon a claim to American citizenship, which was basic jurisdictional element in the prospective deportation proceedings. Indeed, Miss Elg could have demanded a trial *de novo* on that issue even after deportation had been ordered. *Ng Fung Ho* v. *White*, 259 U. S. 276.[6] Accordingly, she was held entitled to a prior judicial declaration on the issue of her American citizenship. Moreover, an order requiring the issuance of an American passport also was sought against the Secretary of State, who would not have been a party in any habeas corpus proceeding. The instant case presents no such fundamental jurisdictional issue. It concerns solely a question of statutory interpretation which can be resolved in habeas corpus proceedings.

It is significant that in the intervening interval of eleven years no court has attempted, until now, to rely on the *Elg* case as authority for a declara-

[6] Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, now authorizes specifically the bringing of court action to obtain a declaratory judgment upon a claim to American citizenship. In this connection, it is significant that when Congress enacted this special provision it used express language to accomplish its purpose to permit such suits to be brought, at the wish of the complainant, in the District of Columbia court or in the district of his residence.

tory judgment suit to review every order of deportation. Aliens aggrieved by such orders have been able to obtain a speedy and complete determination of their claims by invoking the writ of habeas corpus. See *Bridges* v. *Wixon,* 326 U. S. 135.

4. Nevertheless, the Court of Appeals for the District of Columbia Circuit, in the instant case, and the Court of Appeals for the Third Circuit, in *Trinler* v. *Carusi,* 166 F. 2d 457, have now joined in adopting an expansive interpretation of the Administrative Procedure Act (and the Declaratory Judgment Act), and have sanctioned a right to judicial review of deportation orders beyond the limitations previously recognized.[7] Although the district courts have been divided on this issue, it is likely that the agreement in the views expressed by the Courts of Appeals in the only two circuits where the issue has been adjudicated may now be regarded as setting a pattern for future determinations. This likelihood is accentuated by the recent holdings in the Second and Third Circuits that most suits for

[7] In the *Trinler* case, the court deemed appropriate a "petition for review" which challenged the deportation order. Although the *Trinler* case subsequently was found to have been abated (168 F. 2d 1014), the Court of Appeals for the Third Circuit has since manifested its continued adherence to the doctrine of that case. *Podovinnikoff* v. *Miller,* No. 10071, decided January 30, 1950. The Court of Appeals for the Second Circuit has deemed it unnecessary to rule directly on this point. *Connor* v. *Miller,* 178 F. 2d 755; *Azzolini* v. *Watkins,* 172 F. 2d 897, 898.

review of deportation orders under the Administrative Procedure Act, if they are maintainable at all, must be brought in the District of Columbia, where the Attorney General and the Commissioner of Immigration and Naturalization have their official residences.[8] *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Podovinnikoff* v. *Miller*, (C. A. 3, No. 10071), decided January 30, 1950. Consequently, the ruling of the court below will govern the forum in which all future actions may be, and probably must be, brought.

a. Thus, the decision in the instant case will most likely have far-reaching consequences to the operations of the Immigration and Naturalization Service, which is confronted with the possibility of meeting applications for judicial review in the District of Columbia in thousands of deportation proceedings annually.[9] Added delay would result, in some and probably large measure, from concentration of this litigation in the overcrowded courts of the District of Columbia, where civil actions already encounter a calendar delay of at least one year after issue

[8] A writ of habeas corpus, on the other hand, could issue only in the district in which the alien is detained. *Ahrens* v. *Clark*, 335 U. S. 188. In this connection, see the remarks of Congressman Walter on the continuance by the Administrative Procedure Act of "the venue arrangements under existing law" (quoted *supra*, p. 15).

[9] During the fiscal year 1948, there were 31,540 deportation hearings and deportations actually occurred in 20,371 cases. *Annual Report*, Commissioner of Immigration and Naturalization (1948), p. 23.

is joined. Since declaratory or review actions fall into the stream of general litigation, they would meet this delay, as well as other deferments incident to formal pleadings, motions, etc. This situation will also tend to encourage dilatory and frivolous proceedings, in a district far removed from an alien's residence or prospective place of detention, since even an insubstantial complaint will almost inevitably assure some delay. Habeas corpus proceedings, on the other hand, are not placed in the general stream of civil litigation. By their inherent nature and by statutory command they must be resolved expeditiously. 28 U. S. C. 2243. See Mr. Justice Frankfurter, concurring, in *Estep* v. *United States*, 327 U. S. 114, 141. The opportunities for pressing frivolous and dilatory attacks on deportation orders consequently are minimized in habeas corpus proceedings. Moreover, if an anticipatory suit may be maintained to procure a declaratory ruling, there is nothing to prevent the alien from pursuing the attack in habeas corpus proceedings after he is defeated. Multiplication of remedies addressed to the same issue thus would be fostered.

b. The court below appears to suggest that habeas corpus is a harsh vehicle for challenging a deportation order, since the alien would have "to go into custody" and "to sacrifice his possessions in preparations for leaving the country" (R. 22).

But this seems to us an unrealistic approach to the problem. In the first place, the deportation order never comes as a sudden surprise to the respondent. He has faced the imminent possibility of deportation for some time while he was in legal custody, although usually at liberty on bail, and while his case moved through the processes of administrative adjudication. Upon request, he is given adequate opportunity to wind up his affairs. If he desires to test the deportation order he may surrender and obtain a speedy adjudication in habeas corpus, with opportunity for appeal, which eventually may even reach this Court. Upon presenting a claim that is *prima facie* meritorious, he may procure release on bail, either by the administrative authorities or by the court, pending a final determination.[10] Thus, his situation in habeas corpus would not be appreciably different from what it was previously when he was at liberty on bail pending determination of the administrative proceeding. Of course, in any case when his pleas are finally unsuccessful, there will come a time when he must wind up his affairs. But that is a contingency which he must anticipate and plan to meet.

[10] For example, in *Bridges* v. *Wixon*, 326 U. S. 135, Bridges surrendered for the purpose of testing the deportation order and was forthwith admitted to bail by the district court pending its decision. The bail was continued during the three-year period in which the case was under consideration in the courts.

c. A further reason why an alien who is not in custody should be barred from utilizing the Administrative Procedure or Declaratory Judgment Acts is that the administrative process is not complete. As described in Section 19 of the Immigration Act of 1917, deportation consists of three parts: An order of deportation (following arrest and hearing), taking into custody, and physical deportation. Only the first of these stages has been traversed in the instant case. The remaining two hardly are inconsequential, since until the immigration officers move to execute the order of deportation there is no certainty that deportation actually will be accomplished. The deportation order may be rescinded or ameliorated. Or it may prove impossible to effect expulsion because the deportee's country will not accept him. In such cases, travel documents cannot be obtained, and no attempt is made to effectuate the deportation order. Finally, the alien may be able to bar deportation through special legislation enacted by Congress.

Thus, judicial intervention is premature until the alien is taken into custody. The situation is comparable to that of a person finally classified by a selective service board who attempts to obtain judicial review of that classification before

the effort is made fully to execute the order. Cf. *Falbo* v. *United States*, 320 U. S. 549, 553.[11]

## II

Even if the court below is sustained in its ruling that relief under the Administrative Procedure Act or Declaratory Judgment Act was appropriate, we believe it erred on the merits of the claim. Concededly, respondent, as a neutral alien, in 1942 executed and filed an application for relief from military service (Form DSS 301). He was granted the exemption he requested and never was called upon to perform any military service. Not until November 1946, did he seek to withdraw his exemption application. Under the law, the filing of such an application debarred him from becoming a citizen. *Supra*, p. 5. Yet the court found that he was not bound by the

[11] It should also be pointed out that in the instant type of case the court is hardly in a position to render a complete, decisive judgment. At most, it would adjudicate only one segment of the controversy. There is nothing in the order below, for instance, to prevent the Attorney General from again denying suspension of deportation, in the exercise of his discretion, and decreeing that the alien be deported on the outstanding charge that he has remained in the United States longer than permitted by law. The respondent then might challenge the new administrative finding by another declaratory or review proceeding or by habeas corpus. And even if the Attorney General were to give favorable consideration to the application for suspension of deportation, his determination would be merely intermediate, since under the statute the relief cannot become effective unless it is approved by Congress. *Supra*, p. 3.

consequences of this document, although he had willingly accepted its benefits.

The mandate of the Selective Training and Service Act was directed against every citizen and "every other male person residing in the United States". Respondent never contended before the selective service board that he was not residing in the United States. He did register, without protest, and never sought exemption on a claim of nonresidence. Nor has he alleged in his complaint herein that he was not then, or is not now, a resident of the United States. He has lived in the United States continuously since 1939, and has been employed for most of that time. Nevertheless, the Court of Appeals holds that the insecurity of his immigration status proves that he did not sufficiently "reside" in the United States for the purposes of the Selective Training and Service Act (R. 24–28).

The determination of the court below on this phase of the case is irreconcilably opposed to that of the Court of Appeals for the Second Circuit in *Benzian* v. *Godwin*, 168 F. 2d 952, certiorari denied, 335 U. S. 886, which adopted the construction of similar legislative requirements announced by the Attorney General in 39 Op. Atty. Gen. 504. Although there are some factual deviations, the reasoning in the two decisions is directly in conflict, as the court below admits (R. 26–28).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
*Solicitor General.*

MARCH 1950.

# In the Supreme Court of the United States

OCTOBER TERM, 1950

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No. 34

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES ET AL., PETITIONERS

*v.*

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 6 |
| Summary of argument | 10 |
| I. The Attorney General's denial of suspension of deportation under Section 19 (c) of the Immigration Act of 1917 does not present a justiciable question under Article III of the Constitution | 13 |
| II. The provision of the Immigration Act that "the decision of the Attorney General shall be final" in deportation cases precludes judicial review of deportation orders except in habeas corpus proceedings | 21 |
| A. Preliminary analysis | 21 |
| B. In providing that the Attorney General's decision should be "final", Congress deliberately made deportation orders subject only to limited and collateral review in habeas corpus proceedings | 24 |
| C. The Declaratory Judgment Act of 1934 did not alter or enlarge the review of deportation orders | 35 |
| D. The Administrative Procedure Act did not alter the review of deportation orders | 41 |
| E. The practical consequences of the decision below also require its reversal | 56 |
| III. The Court below erred in holding that the respondent's claimed exemption from military service as a neutral alien did not make him ineligible for suspension of deportation | 62 |
| Conclusion | 81 |


Argument 13

## CITATIONS

Cases:


| | |
|---|---|
| *Adel* v. *Shaughnessy*, 183 F. 2d 371 | 15, 56 |
| *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 | 36 |
| *Ahrens* v. *Clark*, 335 U. S. 188 | 59 |
| *American Federation of Labor* v. *McAdory*, 325 U. S. 450 | 37 |
| *American Stevedores* v. *Porello*, 330 U. S. 446 | 47 |
| *Bartsch* v. *Watkings*, 175 F. 2d 245 | 56 |
| *Bata Shoe Co, Inc.* v. *Perkins*, 33 F. Supp. 508 | 35 |

Cases—Continued


| | Page |
|---|---|
| *Benzian* v. *Godwin*, 168 F. 2d 952, certiorari denied, 335 U. S. 886 | 75 |
| *Billings* v. *Truesdell*, 321 U. S. 542 | 75 |
| *Bilokumsky* v. *Tod*, 263 U. S. 149 | 24 |
| *Brewster* v. *Gage*, 280 U. S. 327 | 75 |
| *Bridges* v. *Wixon*, 326 U. S. 135 | 27, 57 |
| *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103 | 18, 19 |
| *Chinese Exclusion Case, The*, 130 U. S. 581 | 25 |
| *Chow Gin* v. *United States*, 175 F. 2d 299 | 68 |
| *Coffman* v. *Breeze Corps*, 323 U. S. 316 | 36 |
| *Connor* v. *Miller*, 178 F. 2d 755 | 59 |
| *Costanzo* v. *Tillinghast*, 287 U. S. 341 | 75 |
| *Cox* v. *United States*, 332 U. S. 442 | 66 |
| *Darabi* v. *Northrup*, 54 F. 2d 70 | 35 |
| *Eagles* v. *Samuels*, 329 U. S. 304 | 32 |
| *Eccles* v. *Peoples Bank*, 333 U. S. 426 | 37 |
| *Ekiu* v. *United States*, 142 U. S. 651 | 25 |
| *Estep* v. *United States*, 327 U. S. 114 | 31, 61, 66 |
| *Fafalios* v. *Doak*, 50 F. 2d 640, certiorari denied, 284 U. S. 651 | 34 |
| *Falbo* v. *United States*, 320 U. S. 549 | 61, 66 |
| *Federal Power Commission* v. *Arkansas Power and Light Co.*, 330 U. S. 802 | 37 |
| *Fong Yue Ting* v. *United States*, 149 U. S. 698 | 26, 27 |
| *Ghosh, Ex parte*, 58 F. Supp. 851 | 77 |
| *Goldstein* v. *United States*, C. A. D. C., decided July 3, 1950 | 38 |
| *Gordon* v. *United States*, 117 U. S. 697 | 16 |
| *Hayburn's Case*, 2 Dall. 409 | 10, 15, 16 |
| *Helvering* v. *Winmill*, 305 U. S. 79 | 75 |
| *Hiatt* v. *Brown*, 339 U. S. 103 | 34 |
| *Impiriale* v. *Perkins*, 66 F. 2d 805, certiorari denied, 290 U. S. 690 | 35 |
| *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 | 17 |
| *Japanese Immigrant Case, The*, 189 U. S. 86 | 27, 33 |
| *Kabadian* v. *Doak*, 65 F. 2d 202, certiorari denied, 290 U. S. 661 | 35 |
| *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 | 15, 56 |
| *Kawadias, Petition of*, 177 F. 2d 497 | 56 |
| *Kirkland* v. *Atlantic Coast Line R. R. Co.*, 167 F. 2d 529, certiorari denied, 335 U. S. 843 | 52 |
| *Knauff* v. *McGrath*, 181 F. 2d 838 | 68 |
| *Knauff* v. *Shaughnessy*, 338 U. S. 537 | 26 |
| *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 | 17 |
| *Lem Moon Sing* v. *United States*, 158 U. S. 538 | 25 |
| *Leonhard* v. *Eley*, 151 F. 2d 409 | 68 |
| *Levine* v. *Farley*, 107 F. 2d 186, certiorari denied, 308 U. S. 622 | 49 |

Cases—Continued Page

*Lewis v. Frick*, 233 U. S. 291 ..... 27
*Ludecke* v. *Watkins*, 335 U. S. 160 ..... 52, 64
*Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540 ..... 37
*Mahler* v. *Eby*, 264 U. S. 32 ..... 26
*Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 ..... 56
*Muskrat* v. *United States*, 219 U. S. 346 ..... 17
*Ng Fung Ho* v. *White*, 259 U. S. 276 ..... 39
*Nueva Anna, The*, 6 Wheat. 193 ..... 64
*Oceanic Steam Nav. Co.* v. *Stranahan*, 214 U. S. 320 ..... 25
*Perkins* v. *Elg*, 307 U. S. 325 ..... 39, 40, 53
*Podovinnikoff* v. *Miller*, 179 F. 2d 937 ..... 59
*Poliszek* v. *Doak*, 57 F. 2d 430 ..... 35
*Rash* v. *Zurbrick*, 6 F. Supp. 390 ..... 34
*Sanborn, In re*, 148 U. S. 222 ..... 17
*Savorgnan* v. *United States*, 338 U. S. 491 ..... 67
*Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667 ..... 38
*Sleddens* v. *Shaughnessy*, 177 F. 2d 363 ..... 15, 56
*Sunal* v. *Large*, 332 U. S. 174 ..... 32
*Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 ..... 52
*Trinler* v. *Carusi*, 166 F. 2d 457, abated 168 F. 2d 1014 ..... 24, 33, 41
*Turner* v. *Williams*, 194 U. S. 279 ..... 27
*United Public Workers* v. *Mitchell*, 330 U. S. 75 ..... 36
*United States* v. *Corrick*, 298 U. S. 435 ..... 13
*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 ..... 64
*United States* v. *Ferreira*, 13 How. 40 ..... 16
*United States* v. *Haug*, 150 F. 2d 911 ..... 77
*United States* v. *Hill*, 120 U. S. 69 ..... 75
*United States* v. *Jefferson Electric Co.*, 291 U. S. 386 ..... 17, 18, 21
*Vajtauer* v. *United States*, 273 U. S. 103 ..... 34
*Walther* v. *District Director*, 175 F. 2d 693 ..... 56
*Wong Yang Sung* v. *McGrath*, 339 U. S. 33 ..... 57
*Weddeke* v. *Watkins*, 166 F. 2d 369, certiorari denied, 333 U. S. 876 ..... 15, 56
*Zabadlija* v. *Garfinkel*, 173 F. 2d 222 ..... 56
*Zakonaite* v. *Wolf*, 226 U. S. 272 ..... 27
*Zartarian* v. *Billings*, 204 U. S. 170 ..... 68

Constitution and Statutes:

Constitution of the United States, Art. III ..... 15
Act of March 20, 1933, 38 U. S. C. 705 ..... 49, 50
Act of July 1, 1948, 62 Stat. 1206 ..... 3, 14, 68
Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1001, et seq.:
Sec. 2 (a) ..... 61
Sec. 10 ..... 15, 41, 48, 49, 50, 55
Sec. 10 (a) ..... 5, 53
Sec. 10 (b) ..... 5, 53, 54
Sec. 10 (c) ..... 5, 53, 55
Alien Registration Act of June 28, 1940, 8 U. S. C. 452 ..... 71

Constitution and Statutes—Continued
Articles of War enacted 1950, Art. 76 ..... 30
Declaratory Judgment Act of 1934, 28 U. S. C. 2201 .. 4, 35, 37
Immigration Act of 1917, 39 Stat. 889, as amended:
Sec. 3, 8 U. S. C. 136 ..... 68
Sec. 17, 8 U. S. C. 153 ..... 25
Sec. 19 (a), 8 U. S. C. 155 (a) ..... 2, 24, 53
Sec. 19 (b), 8 U. S. C. 155 (b) ..... 53
Sec. 19 (c), 8 U. S. C. 155 (c) ..... 3, 14, 15, 20, 21, 22, 23, 53
Nationality Act of 1940, 54 Stat. 1137:
Sec. 324 (a), 8 U. S. C. 724 (a) ..... 79
Sec. 503, 8 U. S. C. 903 ..... 39
Sec. 701, 8 U. S. C. 1001 ..... 79
Selective Draft Act of 1917, 40 Stat. 76 ..... 63
Selective Service Act of 1948, Sec. 13 (b), 50 U. S. C. App. (Supp. III) 463 (b) ..... 61
Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. 301 ..... 30
Sec. 2 ..... 68, 69
Sec. 3 (a) ..... 6, 19, 23, 62, 63, 68, 69, 70
Sec. 5 (a) ..... 69, 70, 74
Sec. 10 ..... 74
28 U. S. C. 2243 ..... 58
Miscellaneous:
Annual Report of the Attorney General (1949), p. 700 ..... 58
Annual Report of the Director of the Administrative Office of the United States Courts (1949), p. 112 ..... 59
Attorney General's Manual on the Administrative Procedure Act (1947):
P. 93 ..... 46
P. 94 ..... 48
P. 95 ..... 48
32 C. F. R.:
611.12 issued Feb. 7, 1942 ..... 73
611.13 ..... 73
611.21 issued March 16, 1942 ..... 73
611.22 ..... 74
611.23 ..... 74
86 Congressional Record:
1093 ..... 69
11371, 11390, 11664–11667 ..... 69
87 Congressional Record:
9934 ..... 70
10055 ..... 70
Davis, *The Scope of Review of Federal Administrative Action*, 50 Col. L. R. 559 (1950) ..... 48
Dickinson, *The Federal Administrative Procedure Act and the Administrative Agencies* (1947), pp. 562–4 ..... 55
Federal Rules of Civil Procedure, Rule 57 ..... 57
III Hackworth, *Digest of International Law*, p. 58 ..... 63

Miscellaneous—Continued Page

*Hearings Before a Subcommittee of the Committee of the Judiciary*, U. S. Senate, 77th Cong., 1st sess., on S. 674, S. 675 and S. 918 (1941):

P. 569 ... 47
P. 838 ... 44
P. 845 ... 44
P. 849 ... 44
P. 850 ... 44
P. 1349 ... 47
Pp. 1350–1359 ... 44
P. 1390 ... 47
P. 1400 ... 44
P. 1452 ... 46

House Doc. 986, 76th Cong., 3d sess., p. 11 ... 41
H. Rep. 491, 81st Cong., 1st sess., p. 35 ... 30
H. Rep. 1508, 77th Cong., 1st sess., p. 4 ... 70, 71
H. Rep. 1554, 77th Cong., 1st sess ... 70
H. Rep. 1203, 79th Cong., 1st sess ... 50
1 Hyde, *International Law* (Second Rev. Ed.) 198 ... 64
Local Board Memorandum No. 112, issued March 16, 1942 ... 64
39 Op A. G. 504 ... 72

Report of the Attorney General's Committee on Administrative Procedure (1941):

P. 92 ... 43
P. 245 ... 43
P. 246 ... 43

S. 7, 79th Cong., 1st sess ... 50
S. 3455, 81st Cong., 2d sess., Sec. 106 ... 29
Sen. Doc. 248, 79th Cong., 2d sess.:

P. 36 ... 51
P. 37 ... 46, 55
P. 83 ... 44
P. 223 ... 46
P. 229 ... 46, 51
P. 230 ... 51
P. 311 ... 45
P. 369 ... 45
P. 407 ... 46
P. 413 ... 51
P. 415 ... 46

Sen. Rep. 352, 64th Cong., 1st sess ... 24
Sen. Rep. 486, 81st Cong., 1st sess., p. 32 ... 30
Sen. Rep. 1515, 81st Cong., 2d sess.:

P. 639 ... 60
P. 864 ... 57
P. 870 ... 58

2 Vom Baur, *Federal Administrative Law* 787 ... 29

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 13–25) is reported at 179 F. 2d 796. The District Court wrote no opinion (See R. 9).

### JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 25). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for certiorari was ex-

tended to and including March 27, 1950 (R. 28). Petition for a writ of certiorari was filed March 24, 1950, and was granted May 15, 1950 (R. 29). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Attorney General's refusal to suspend deportation of an alien under Section 19 (c) of the Immigration Act of 1917 presents a justiciable question, where his suspension of deportation must be affirmatively approved by a concurrent resolution of the Congress.

2. Whether the Congress has made the Attorney General's decision in alien deportation cases subject to judicial review otherwise than in habeas corpus proceedings.

3. Whether the court below erred in finding that when respondent sought and obtained, as a neutral alien, exemption from military service during World War II, he was not "residing" in the United States and therefore did not become ineligible for suspension of deportation.

## STATUTES INVOLVED

Section 19 (a) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. 155 (a), directs that any alien found subject to deportation "shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is

ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final."

Section 19 (c) of the same Act, as amended, 62 Stat. 1206, 8 U. S. C. (Supp. II) 155 (c), provides that:

> (c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the

reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law.

The Declaratory Judgment Act, 28 U. S. C. 2201, directs that:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. 303, provided in part:

> Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

## STATEMENT

Respondent, an alien who is the subject of deportation proceedings, brought this action, initiated by a "Complaint for Declaratory Judgment and Injunction" (R. 1–5), in the District Court for the District of Columbia, against the Attorney General, the Commissioner of Immigration and Naturalization, and the members of the Board of Immigration Appeals. The suit was brought under the Declaratory Judgment Act and the Administrative Procedure Act (R. 1–2). The

complaint makes the following allegations (R. 2–4): Respondent, a Danish citizen, entered the United States as a temporary visitor on August 17, 1939. He was admitted for a period of sixty days to visit relatives and to attend the New York World's Fair. He asserts that the outbreak of the war in Europe prevented his departure, and that he obtained two extensions of stay, each for six months. Deportation proceedings were commenced against him in May, 1940, on the ground that he had violated his visitor's status by obtaining employment in the United States and had thereby remained in the United States longer than permitted by law. On May 15, 1941, he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. He has remained in the United States since then, has continued to be employed in this country, and married an American citizen on October 12, 1944. (R. 2–3.)

Respondent registered under the Selective Training and Service Act of 1940. However, he executed and filed an application for relief from military service as a neutral alien (Form DSS 301) on or about March 30, 1942. This was done, the complaint alleges, after he had been informed by a member of his local Selective Service board that since he was already subject to deportation, the signing of form DSS 301 would have no effect on his deportation and that he was precluded from obtaining American citizenship. He asserts

that he would not have filed the form if he had known of its effect upon his deportability and eligibility for naturalization. His request for exemption was honored, and he never was called upon to perform military service for the United States. He alleges also that after learning that the filing of form DSS 301 might affect his deportation, he applied, in November 1946, to withdraw his application for exemption. (R. 4.)

The unexecuted warrant of deportation which had been outstanding against him since 1941 was withdrawn on or about June 10, 1946. The deportation proceeding was reopened to permit respondent to apply for suspension of deportation, pursuant to Section 19 (c) of the Immigration Act of 1917, on the basis of his marriage to an American citizen. After consideration of the evidence adduced in connection with the application for suspension of deportation, the Board of Immigration Appeals, on June 27, 1947, denied the plea for suspension of deportation on the ground that respondent's application for relief from military service as a neutral alien had, under Section 3 (a) of the Selective Training and Service Act, rendered him ineligible for naturalization, and consequently disqualified him for suspension of deportation (see *supra*, pp. 3, 6). However, the Board of Immigration Appeals directed that he be permitted to depart from the United States voluntarily in lieu of deportation, if he so desired. A motion for re-

consideration of that order was denied. The complaint further alleges that the Board of Immigration Appeals has "found to exist all facts necessary to authorize the suspension of deportation of plaintiff," except for the finding that he is ineligible for naturalization, and that "it appears that the deportation of plaintiff would be suspended if the Board were of the opinion that plaintiff is eligible to naturalization in the United States" (R. 3). The Board's application of Section 3 (a) of the Selective Training and Service Act is asserted to be erroneous (R. 4).

Respondent has not departed from the United States, nor has any order of deportation been entered against him; he is not in custody (R. 4). He prays for a declaratory judgment that he is eligible for naturalization and that the petitioners should decide his application for suspension of deportation on that basis; he also seeks an injunction restraining petitioners "from exercising their power, authority or discretion in respect of suspension of deportation of plaintiff on the theory that plaintiff is not eligible to naturalization in the United States" (R. 5).

Petitioners moved to dismiss (R. 5), and the District Court granted the motion (R. 9). On appeal, that order was reversed. The Court of Appeals concluded that the Attorney General's decision to deport an alien may be reviewed by the courts under the Administrative Procedure

Act, and probably also under the Declaratory Judgment Act, in a suit for a declaratory judgment. In exercising its asserted power to review the administrative determination in this proceeding, the court held that since respondent was subject to an order of deportation at the time he applied for relief from military service, he was not then "residing in the United States," for the purpose of the Selective Training and Service Act, and his application for relief from military service was therefore a nullity since he was not actually subject to such service. Because of this holding, the court found it unnecessary to require a hearing on respondent's allegation that he was misled by information given to him by the local Selective Service board concerning the effect of his claim of exemption.

## SUMMARY OF ARGUMENT

### I

The Attorney General's suspension of the deportation of an alien pursuant to Section 19 (c) is not final, but must be affirmatively approved by a concurrent resolution of the Congress. Since neither the decision of the Attorney General nor any judicial action with respect to his decision is binding upon the Congress, the respondent is in effect asking for an advisory opinion such as Federal courts have refused to render since *Hayburn's* case.

II

The Immigration Act of 1917 provides that the decision of the Attorney General in alien deportation cases shall be "final". This has long been held to mean that deportation orders are subject only to the limited collateral review afforded by habeas corpus proceedings. The court below erroneously concluded that by reason of the Declaratory Judgment Act and the Administrative Procedure Act deportation orders may now be directly reviewed by the courts in suits for declaratory judgments. The Declaratory Judgment Act merely provided a new remedy; it did not purport to confer upon Federal courts jurisdiction otherwise withheld from them. The Congress, by making the judicial review provisions of Section 10 of the Administrative Procedure Act applicable "Except so far as * * * statutes preclude review" expressly preserved whatever finality it had accorded to administrative action by such statutes as the Immigration Act. There is no evidence that the Congress intended to make deportation orders reviewable otherwise than in habeas corpus. The practical problems of venue and calendar delay which would be involved by concentrating the review of such orders in declaratory judgment proceedings in the District of Columbia, further indicate that Congress never contemplated making that remedy

available by virtue of either the Declaratory Judgment Act or the Administrative Procedure Act.

## III

On the merits, the court below erred in holding that the respondent, when he applied for and obtained exemption from military service as a neutral alien, was not "residing" in the United States, and therefore did not become ineligible for citizenship and for suspension of deportation. The legislative history of the Selective Training and Service Act makes clear the legislative purpose to impose liability for military service upon aliens in the respondent's position. The extension, in December 1941, of liability for service to non-declarant aliens, together with the simultaneous grant of power to the President to establish exempt categories of non-declarant aliens, can only mean that Congress intended generally to impose liability for service upon all aliens, and to leave the making of the necessary exceptions to Presidential regulations, rather than to endless litigation over such questions as residence. Those regulations provided a procedure by which the respondent could have asserted his alleged non-resident status. Having failed to use that remedy, and having requested and enjoyed exemption from military service as a neutral alien, he must accept the consequences which the Congress attached to such exemption. The argument that he

did not then "reside" in the United States because he had been declared deportable and could not leave this country because of the war, is entirely unrealistic and technical, in view of the facts that he had been here over two years before he claimed exemption from military service, married here during the war, evidenced no interest in his status with respect to citizenship until the fighting was over, and now desires to remain here. In any event, it is clear that Congress intended to impose liability for service upon all aliens, resident or non-resident, except those excepted as non-residents in administrative procedures which the respondent failed to exhaust.

## ARGUMENT

### I

### THE ATTORNEY GENERAL'S DENIAL OF SUSPENSION OF DEPORTATION UNDER SECTION 19 (c) OF THE IMMIGRATION ACT OF 1917 DOES NOT PRESENT A JUSTICIABLE QUESTION UNDER ARTICLE III OF THE CONSTITUTION

Before coming to the questions considered by the court below, we feel obliged to bring to the Court's attention a question as to whether the case presents a justiciable controversy within the jurisdiction of the Federal courts. Although this point was not presented to the court below or in the petition for certiorari, it would seem to be of such a fundamental jurisdictional nature that it may be raised by a party for the first time in this Court or by the Court *sua sponte*. *United States* v. *Corrick*, 298 U. S. 435, 440.

The decision of the Attorney General in granting suspension of deportation pursuant to Section 19 (c) is not final in the sense that nothing more remains to be done to permit an otherwise deportable alien to remain in the United States. If the deportation of an alien is suspended by the Attorney General pursuant to Section 19 (c) for more than six months, "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." If during the session of Congress at which a case is thus reported or before the end of the following session of Congress, "the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings." If by the end of such following session, "the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law."[1]

It is clear, therefore, that when the Attorney General acts favorably upon an application for suspension of deportation pursuant to Section 19 (c), he is in effect making a recommendation to the Congress. The Congress, or either House, may reject his recommendation for any reason

[1] Prior to the 1948 amendment of Section 19 (c) (62 Stat. 1206) the decision of the Attorney General in suspending deportation was final, subject to disapproval by a concurrent resolution of the Congress.

whatsoever, and thus require deportation of the alien.

The decisions of this Court indicate that such an administrative recommendation cannot be made the subject of the exercise of judicial power because a judicial decision in favor of the alien is in no way binding upon the Congress, which has reserved to itself the final decision on such suspension.[2]

Since *Hayburn's* case, 2 Dall. 409, which reflects the views of five justices of this Court sitting on circuit, this Court has held without variation that the courts created by Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to

[2] Upon this analysis of the Attorney General's function under Section 19 (c), we do not reach the question of whether his function is so completely discretionary as to present no issue for judicial review. Section 19 (c), in providing a possibility of relief for persons otherwise deportable, provides that the Attorney General "*may*" suspend deportation. The discretionary nature of this power is emphasized by the fact that Congress has reserved the ultimate decision to itself. The lower Federal courts have characterized as discretionary the Attorney General's power under Section 19 (c). *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *Sleddens* v. *Shaughnessy*, 177 F. 2d 363 (C. A. 2); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2). It should be noted that Section 10 of the Administrative Procedure Act provides for judicial review "Except so far as * * * agency action is by law committed to agency discretion."

review by an administrative official. *Hayburn's* case itself involved a statute empowering the Federal judges to make decisions as to Revolutionary War pensions, but these decisions would then be subject "to the consideration and suspension of the secretary of war, and then to the revision of the legislature." In *United States* v. *Ferreira,* 13 How. 40, the statute authorized the judges of the Florida district court to pass upon certain claims; if the judges "shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof." The Court, speaking through Mr. Chief Justice Taney, reaffirmed the doctrine of *Hayburn's* case, stating that the power sought to be imposed upon the Court "subject to the revision of a Secretary *and of Congress,* could not be executed by the court as a judicial power." 13 How. 50 (italics supplied).

Again in *Gordon* v. *United States,* 117 U. S. 697, decisions of the Court of Claims were not to become effective until after an appropriation therefor "shall be estimated for by the Secretary of the Treasury"; it depended upon the Secretary "to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant" (p. 699). This was held to render the action of the Court of Claims

nonjudicial, and to bar appeal to the Supreme Court in Court of Claims cases. The opinion states that Congress cannot "authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties" (p. 702), and that "when the decision of the court was subject to the revision of a Secretary *and Congress*, it was not the exercise of a judicial power, and could not therefore be executed by the court" (p. 703) [italics supplied]. Chief Justice Taney concluded that "no principle of constitutional law has been more firmly established or constantly adhered to" (p. 704). These decisions have been repeatedly cited with approval in subsequent cases. See particularly *In re Sanborn*, 148 U. S. 222, 226; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 483–484; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 456–457; *Muskrat* v. *United States*, 219 U. S. 346, 362; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401. In the *Sanborn* case, the Court declared, in the course of holding that it had no jurisdiction to review a special finding of the Court of Claims:

> Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We

> regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.
>
> It is therefore, within the scope of the decision in *Gordon* v. *United States*. * * *

And in *United States* v. *Jefferson Electric Co.*, 291 U. S. at 400–401 the Court stated, with respect to a statute which might be construed as authorizing a judgment which would be paid only if the claimant proved to the Commissioner that he was entitled to it:

> Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.

More recently, in *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113–114, in considering the reviewability of an order of the Civil Aeronautics Board which was subject to the approval or disapproval of the President, this Court stated:

> To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most ob-

noxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423; *Muskrat* v. *United States,* 219 U. S. 346; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386.

Here, the ultimate decision on the suspension of deportation is as completely within the control and discretion of the Congress as the decision in the *Waterman* case was "within the President's exclusive, ultimate control." Here, as in that case, no judicial action can be effective to suspend the deportation of the respondent. Even if the courts conclude that the Attorney General has erroneously interpreted Section 3 (a) of the Selective Training and Service Act, and even if the Attorney General thereafter acts to suspend the

deportation of the respondent, the Congress remains entirely free to refuse to approve such suspension, even on the ground originally given by the Attorney General. Indeed, the Attorney General will remain free to deny relief in the exercise of his discretion.

It may be contended that the respondent is entitled to have his eligibility for suspension correctly determined so that his case will at least be presented to the Congress. However, a similar argument was in effect rejected in all the cases from *Hayward's* case to the *Waterman* case. The question always is, not whether a party might be benefited by the courts' action, but whether the courts can dispose of the controversy decisively—in a manner binding upon the parties. Here the courts cannot decide the respondent's eligibility for naturalization in a manner binding upon the Congress. Thus, the respondent is asking the courts for a mere advisory opinion to the Congress that he is eligible for naturalization. Since Washington's time, the Federal courts have refused to give such opinions even when requested by one of the other branches of the Government.

We submit, therefore, that where an alien about to be deported challenges only the administration of the provisions of Section 19 (c) for suspension of deportation, he does not present an issue justiciable by Federal courts.[3]

[3] Even though it be contended that the court below, as a District of Columbia court, may be vested with nonjudicial

## II

### THE PROVISION OF THE IMMIGRATION ACT THAT "THE DECISION OF THE ATTORNEY GENERAL SHALL BE FINAL" IN DEPORTATION CASES PRECLUDES JUDICIAL REVIEW OF DEPORTATION ORDERS EXCEPT IN HABEAS CORPUS PROCEEDINGS

#### A. Preliminary Analysis

In this case, an order for the deportation of the respondent was withdrawn, and the deportation proceeding against him was reopened, to permit him to apply for suspension of deportation under Section 19 (c) of the Immigration Act of 1917 (8 U. S. C. (Supp. II) 155 (c)). His application has been denied by the Board of Immigration Appeals on the ground that he is ineligible for naturalization. However, the Board has extended to him the privilege of voluntarily departing from the United States in lieu of deportation. If he does not depart from the United States within a reasonable time, the deportation order will be reissued and he will be deported.

It is the Government's position that the declaratory judgment proceeding initiated by the respondent is simply an attempt by him to obtain direct judicial review of the Attorney General's decision that he must be deported from the United States. The respondent disagrees with this view

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functions, nothing in the habeas corpus statute, the Declaratory Judgment Act, or the Administrative Procedure Act suggests that the Congress intended to vest in District of Columbia courts nonjudicial functions in relation to Section 19 (c) of the Immigration Act of 1917. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401.

of the procedural issue. First, he contends that no deportation order is outstanding against him but that, rather, he has been ordered to depart voluntarily from the United States. We wish to emphasize that the respondent has not been ordered to depart voluntarily; voluntary departure at his own expense in lieu of deportation is a privilege which the Attorney General is authorized by Section 19 (c) of the Immigration Act of 1917 to grant to a deportable alien who has proved good moral character for the preceding five years. While it is true that there is not presently outstanding a deportation order against the respondent and, *a fortiori,* he is not in that custody for deportation which he could challenge in habeas corpus proceedings, the respondent also insists that the administrative process is complete. We agree, in the realistic sense that a deportation order probably will issue and he will be deported if he does not depart voluntarily. We do not here raise the defense that the administrative decision is not yet final for the purpose of review.[4]

[4] In the courts below, the Government failed to urge that until an order for the respondent's deportation was issued, in the event of his failure to depart voluntarily, the administrative action had not become final for the purpose of review by habeas corpus or otherwise. We believe that this circumstance properly raised would have required dismissal of the complaint. Accordingly, we wish to make clear that by our position in this Court we are not conceding that deportation action can be final prior to the issuance of the deportation order.

Nevertheless, while the purpose of respondent's action is to avert his deportation, he contends that he is not attacking the administrative decision that he shall be deported. Rather, he contends that he is merely attacking the decision that by reason of Section 3 (a) of the Selective Training and Service Act of 1940 he is ineligible for naturalization and therefore ineligible for suspension of deportation under Section 19 (c) of the Immigration Act.

The administrative process leading to the issuance of a deportation order is a single one. One of the issues to be determined before an alien is deported is whether he is entitled to suspension of deportation under Section 19 (c). In many cases, evidence relating to eligibility for such discretionary relief is offered and received in the main deportation hearing. In other cases, as here, the deportation proceeding is reopened to consider that issue. The issue of suspension from deportation can arise only in a deportation proceeding because it becomes relevant only if the alien is otherwise deportable. The entire proceeding has as its purpose to determine whether the alien shall be deported. If the respondent's contention is upheld, there will be created possibilities for piecemeal review of the deportation process since presumably he could later raise other issues in habeas corpus. More broadly, all sorts of legal issues relating to deportation

could be singled out for judicial review prior to the taking of the alien into custody, under the respondent's contention.

However, the court below clearly considered that the procedural issue was whether an administrative decision that an alien should be deported can be challenged otherwise than in habeas corpus. This question was answered affirmatively by the court below, as it had been in *Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3), abated 168 F. 2d 1014. It was upon the procedural issue as thus stated and decided by the court below that the Government petitioned for a writ of certiorari.

B. In Providing That the Attorney General's Decision Should Be "Final", Congress Deliberately Made Deportation Orders Subject Only to Limited and Collateral Review in Habeas Corpus Proceedings

Section 19 (a) of the Immigration Act of 1917 provides that "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." The clear purpose of this provision was to preclude judicial review of the Attorney General's decisions in alien deportation cases insofar as the Congress could do so under the Constitution. Thus, in the report of the Senate Committee on Immigration, Sen. Rep. 352, 64th Cong., 1st sess., it is stated (p. 16):

> The last provision * * *, while new in this particular location, is not new in the

> law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded in our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (*The Japanese Immigrant* Case, 189 U. S. 86; *Pearson* v. *Williams,* 202 U. S. 281, etc.).

In the same Act, the Congress repeated its command, first stated in 1888, that administrative orders excluding aliens should be final (Sec. 17, 8 U. S. C. 153). As the Senate Report points out, these provisions for administrative finality were consistent with the prior administration and interpretation of the immigration laws.

It has always been recognized that the power to exclude or expel aliens is a necessary power of every national government, and that it is a political function, relating to the external affairs of the nation, which may be vested in executive officers.[5] Thus, with respect to the admission or exclusion of aliens, this Court declared in *Lem Moon Sing* v. *United States,* 158 U. S. 538, 547, that:

> The power of Congress to exclude aliens altogether from the United States, or to

[5] *The Chinese Exclusion Case,* 130 U. S. 581, 603; *Ekiu* v. *United States,* 142 U. S. 651, 653, 659, 660. In *Oceanic Steam Navigation Co.* v. *Strahan,* 214 U. S. 320, 339, the Court declared: "ever no conceivable subject is the legislative power of Congress more complete."

> prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[6]

With respect to the deportation of aliens, this Court long ago stated in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713:

> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

And in the apt language of *Mahler* v. *Eby,* 264 U. S. 32, 39, 40:

> The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations

[6] This Court's most recent expression is found, of course, in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 542, 543: "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * * Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible officer of the sovereign, such as the Attorney General. The action of the [Attorney General] under such authority is final and conclusive. Whatever the rule may be concerning the deportation of persons who may have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."

> in respect thereto entered into with foreign governments. * * * The sovereign power to expel aliens is political and is vested in the political departments of the Government. Even if the executive may not exercise it without Congressional authority, Congress can not exercise it effectively save through the executive.[7]

Thus, the Congressional command in 1917 that the decisions of the Attorney General in alien deportation cases should be final was consistent with the recognized political nature of the power to exclude or expel aliens from the United States. Of course, the Congress could not and did not suspend the privilege of the writ of habeas corpus with respect to aliens taken into custody for the purpose of deportation. Unless the Congress suspends the privilege of the writ "in cases of rebellion or invasion," it is available to test the validity of every personal detention, including the detention of aliens for deportation. These principles were set forth concisely by Chief Justice Stone, dissenting in *Bridges* v. *Wixon,* 326 U. S. 135, 167, as follows:

> Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no

[7] Among the cases in which similar statements appear are *Fong Yue Ting* v. *United States*, *supra*, 149 U. S. at 713; *Turner* v. *Williams*, 194 U. S. 279; *The Japanese Immigrant Case*, 189 U. S. 86, 97; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *Lewis* v. *Frick*, 233 U. S. 291, 300.

> provision for direct review of his action by the courts. Instead, it has provided that his decision shall be "final", 8 U. S. C. § 155, as it may constitutionally do. *Zakonaite* v. *Wolf*, 226 U. S. 272, 275, and cases cited. Only in the exercise of their authority to issue writs of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution.

Chief Justice Stone's view of the Congressional purpose in giving finality to the Attorney General's decision finds confirmation in the fact that before and after 1917 the Congress has provided frequently and specifically for direct judicial review of the decisions of other administrative agencies. For example, the orders of the Federal Trade Commission, Securities and Exchange Commission, Civil Aeronautics Board, Federal Power Commission, Federal Communications Commission and the National Labor Relations Board are subject to direct review in the United States Courts of Appeals. Decisions of the Social Security Board and of deputy Commissioners under the Longshoremen's and Harborworkers' Compensation Act are reviewable in the United States District Courts. Orders of the Interstate Commerce Commission, the Maritime Board and the Department of Agriculture (under certain statutes) are subject to direct judicial review by a three-judge district court pursuant

to the Urgent Deficiencies Act of 1913.[8] Nevertheless, while enacting these varied and detailed provisions for direct judicial review, and while occasionally amending the immigration laws, the Congress has left unchanged its command that the decision of the Attorney General in deportation cases shall be final.[9]

Again, in enacting other legislation similar to the deportation statute which deals with restraints upon personal liberty, the Congress has made it clear that when it provides in such legislation that administrative action shall be "final", it intends to cut off direct judicial review and to permit only the collateral review in habeas corpus proceedings required by the Constitution. Thus,

[8] See 2 Vom Baur, *Federal Administrative Law*, 787–838.

[9] Indeed, in the pending proposed recodification of the immigration and nationality laws, S. 3455, 81st Cong., 2d Sess., introduced by the Chairman of the Senate Judiciary Committee after a protracted study by that Committee, the provisions for finality of deportation orders are retained and augmented. Sec. 106 of that bill provides that:

"Notwithstanding the provisions of any other law—

"(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

"(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

"(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

Article 76 of the new Articles of War, enacted in 1950, P. L. 506, 81st Cong., 2d sess., provides that:

> The appellate review of * * * the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, * * * shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President.

The legislative history of this provision makes it clear that the Congress intended only to restate the existing rule that the decisions of courts martial are subject only to the limited collateral judicial review afforded by habeas corpus proceedings. H. Rep. 491, 81st Cong., 1st Sess., p. 35; Sen. Rep. 486, 81st Cong., 1st Sess., p. 32. Similarly, the Selective Training and Service Act of 1940 provided that the decisions of draft boards should be "final". This Court held that draft board decisions could be challenged in habeas corpus proceedings by an inductee who had exhausted his administrative remedies and reported for induction, and that a registrant who has not been actually inducted into the armed forces may attack a board's order as arbitrary

or illegal in defense to a criminal prosecution for violation of the order. *Estep* v. *United States*, 327 U. S. 114. In either event, judicial intervention does not occur until it is absolutely clear that the board's order is going to be actually carried out.

In *Estep* v. *United States, supra,* at pp. 122–123, in considering the provision in the Selective Training and Service Act that draft board orders shall be final, this Court stated:

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

The Court then added in a footnote:

> That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation "final." *Chin Yow* v. *United States*, 208 U. S. 8; *Ng Fung Ho* v. *White, supra; Mahler* v. *Eby*, 264 U. S. 32; *U. S. ex rel. Vajtauer* v.

*Commissioner of Immigration*, 273 U. S. 103; *Bridges* v. *Wixon*, 326 U. S. 135.

In *Sunal* v. *Large*, 332 U. S. 174, 177, the Court, in considering whether to allow habeas corpus where a possible appeal had not been taken, stated that "We therefore lay to one side cases such as *Bridges* v. *Wixon*, 326 U. S. 135, * * * where the order of the agency under which petitioner was detained was not subject to judicial review." In *Eagles* v. *Samuels*, 329 U. S. 304, 311, 312, a habeas corpus proceeding seeking to review a selective service board order, it was said that:

> The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is held had jurisdiction to act. * * * Deprivation of petitioner of basic and fundamental safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. * * * If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, * * * or that there was no evidence to support the order, * * * the inquiry is at an end.

Thus, this Court has recognized that the provision for administrative finality in the Immigration Act not only limits judicial review of deportation orders to habeas corpus, but signifi-

cantly limits the scope of review. It is not often that Congress provides that administrative action shall be "final", as it has with respect to exclusion and deportation orders. But when it has done so, the courts have given effect to the legislative purpose of assuring speedy and effective administrative action.[10]

To say, as did the court below following the Court of Appeals for the Third Circuit in *Trinler* v. *Carusi,* 166 F. 2d 457, 461, that the availability of habeas corpus proves that deportation orders are reviewable, is to ignore both the command of the Congress that the Attorney General's decision shall be final and the traditionally narrow scope of habeas corpus. Of course, the legality of every detention of an individual under the authority of and within the United States can be tested by habeas corpus. But habeas corpus is not a substitute for appeal or for direct judicial review. It is an extraordinary remedy which "comes in from outside" to determine the existence of jurisdiction or authority to detain. Habeas corpus is not concerned with whether the administrative decision is correct or even probably correct. In deportation cases, habeas corpus determines only whether an alien is being deported for a cause specified by the Con-

[10] As this Court observed in *The Japanese Immigrant Case,* 189 U. S. 86, 101, the statutory provisions relating to deportation are designed to "secure the prompt, vigorous action contemplated by Congress."

gress, whether there is evidence in support of the Attorney General's decision, and whether the administrative procedure was fair. *Vajtauer* v. *United States,* 273 U. S. 103, 106; *Bilokumsky* v. *Tod,* 263 U. S. 149, 157. Recent decisions of this Court have reemphasized that habeas corpus reaches only the elements of jurisdiction. *Hiatt* v. *Brown,* 339 U. S. 103; *Estep* v. *United States, supra.*

Prior to the Declaratory Judgment Act and the Administrative Procedure Act, the courts rejected every attempt to challenge deportation orders otherwise than in habeas corpus proceedings. Thus, in *Fafalios* v. *Doak,* 50 F. 2d 640 (C. A. D. C.), certiorari denied, 284 U. S. 651, the court concluded that a bill in equity to cancel an order of deportation and to require discretionary action was not a proper remedy. The court found that a writ of habeas corpus, after the alien was in custody, afforded the only appropriate method of relief since

> the writ will accord him an adequate and complete remedy. Should appellant's contention be sustained, every alien, by merely giving bail, might test the legality of the deportation proceedings through a bill in equity in the District of Columbia, instead of through a writ of habeas corpus in the proper district.

A like holding rejecting a bill in equity is found in *Rash* v. *Zurbrick,* 6 F. Supp. 390 (E. D.

Mich.). Similarly, in *Poliszek* v. *Doak*, 57 F. 2d 430 (C. A. D. C.), and *Kabadian* v. *Doak*, 65 F. 2d 202 (C. A. D. C.), certiorari denied, 290 U. S. 661, petitions for writs of prohibition were denied on the ground that habeas corpus was the proper remedy. A bill in equity seeking a declaratory judgment, prior to the Declaratory Judgment Act, likewise was found to be inappropriate. *Darabi* v. *Northrup*, 54 F. 2d 70 (C. A. 6). See also *Impiriale* v. *Perkins*, 66 F. 2d 805 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Bata Shoe Co., Inc.* v. *Perkins*, 33 F. Supp. 508, 509 (D. D. C.).

The court below conceded that before enactment of the Declaratory Judgment Act and the Administrative Procedure Act "habeas corpus was the sole means of questioning the jurisdiction, fairness and conformity to statute of deportation proceedings" (R. 14). It was that court's view, and in this we agree, that the decisive procedural question which confronts us is whether those statutes added to the available methods of review.

C. The Declaratory Judgment Act of 1934 Did Not Alter or Enlarge the Review of Deportation Orders

In 1934, the Congress enacted the Declaratory Judgment Act providing that "In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of any appropriate pleading, may declare the rights and other legal rela-

tions of any interested party seeking such declaration, whether or not further relief is or could be sought." In arriving at its conclusion that Section 10 of the Administrative Procedure Act permitted the review of deportation orders in suits for declaratory judgments, the court below apparently concluded that the declaratory judgment remedy had been available since the enactment of the Declaratory Judgment Act in 1934. Indeed, we believe that this must have been an element in the decision below, since, in the Administrative Procedure Act, the Congress expressly disavowed any purpose of abrogating provisions in other statutes for administrative finality.

In providing for a judicial determination of rights by a Federal court in "a case of actual controversy within its jurisdiction," the Declaratory Judgment Act manifestly did not purport to require the adjudication of every disputed issue, or every class of controversy. In order to proceed under that Act, the controversy must be justiciable (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), must not solicit an advisory or speculative pronouncement (*Coffman* v. *Breeze Corps.*, 323 U. S. 316), and must relate to a situation where the need is immediate, rather than remote or uncertain (*United Public Workers* v. *Mitchell*, 330 U. S. 75). Moreover, an application for a declaratory judgment is addressed to the sound

only "where the interests of justice will be advanced and an adequate and effective judgment may be rendered" (*American Federation of Labor* v. *McAdory*, 325 U. S. 450, 462). And especially where governmental action is involved this discretion must be cautiously exercised in the public interest. See *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431, 434.

Nothing in the Declaratory Judgment Act or in its legislative history suggests that the Act was intended to make reviewable administrative action which for reasons of statute or policy was not previously reviewable. Administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act. *Macauley* v. *Waterman S. S. Co.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power and Light Co., per curiam*, 330 U. S. 802. Administrative action which the Congress has made completely discretionary does not create a justiciable issue in a suit for a declaratory judgment. Similarly administrative action which the Congress has made final so far as it may constitutionally do is not made any more reviewable by the existence of the declaratory judgment remedy.

The Declaratory Judgment Act simply provided a new and additional remedy in situations where the courts could already grant relief. Thus, when Congress made available in the Federal courts the

port to provide for direct judicial review of administrative action which it had declared to be final, subject only to the determination of the existence of jurisdiction in habeas corpus proceedings, or which it had otherwise withdrawn from the jurisdiction of Federal courts. As this Court recently stated in *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671–2:

> "The operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, "jurisdiction" means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act. * * * But the requirements of jurisdiction—the limited subject matters which alone Congress had authorized the District Courts to adjudicate—were not impliedly repealed or modified.

In fact, this was recognized by the court below when it recently held in *Goldstein* v. *United States*, decided July 3, 1950, that the sentence of a court martial could not be challenged in a suit for a declaratory judgment. In so holding, the court stated: "The Declaratory Judgment

Act does not aid the appellant, because that Act does not operate to enlarge the jurisdiction of the District Courts; it is available only where jurisdiction already exists [citing *Skelly Oil Co.* v. *Phillips Co.*]."

Indeed, apart from the instant case, it has never been suggested that a suit under the Declaratory Judgment Act could be substituted for habeas corpus to challenge a deportation order. While the court below cited to the contrary *Perkins* v. *Elg*, 307 U. S. 325, we think it is clear that the decision in that case does not stand for the proposition that deportation orders generally may be challenged in declaratory judgment proceedings. In that case, in its specification of errors in the Supreme Court, the Government did not question the propriety of the declaratory judgment suit. Moreover, the Court there passed upon a claim of American citizenship, which was a basic jurisdictional element in the prospective deportation proceedings. Indeed, Miss Elg could have demanded a trial de novo on that issue even after deportation had been ordered. *Ng Fung Ho* v. *White*, 259 U. S. 276.[11] Accordingly, she

[11] Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, now authorizes specifically the bringing of court action to obtain a declaratory judgment upon a claim to American citizenship. In this connection, it is significant that when Congress enacted this special provision it used express language to accomplish its purpose to permit such suits to be brought, at the wish of the complainant, in the District of Columbia court or in the district of his

was held entitled to a prior judicial declaration on the issue of her American citizenship. Furthermore, an order requiring the issuance of an American passport also was sought against the Secretary of State, who would not have been a party in any habeas corpus proceeding. The instant case presents no such fundamental jurisdictional issue. It involves only a question of statutory interpretation which can be resolved in habeas corpus proceedings.

It is significant that in the intervening period of eleven years no court has attempted, until now, to rely on the *Eig* case as authority for a declaratory judgment suit to review every decision of the Attorney General relating to alien deportation. Moreover, if such actions will lie to review deportation orders, it is equally arguable that they can be used to review orders excluding aliens from the United States, or indeed any other administrative orders which the Congress has declared shall be final. Considering the long history of the statutory provision for finality of both deportation and exclusion orders, it is impossible to believe that the Congress intended, *sub silentio,* to make such orders directly reviewable in declaratory judgment proceedings.

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residence. And it is significant also that Congress never has made any comparable specific provision for a declaratory judgment action by an alien to test the propriety of a deportation order.

### D. The Administrative Procedure Act Did Not Alter the Review of Deportation Orders

The court below held that under Section 10 of the Administrative Procedure Act habeas corpus proceedings were no longer the exclusive method for judicial review of deportation orders, and that such orders could be reviewed in an action for a declaratory judgment. The Court of Appeals for the Third Circuit came to a similar conclusion in *Trinler* v. *Carusi*, 166 F. 2d 457, abated 168 F. 2d 1014, in holding that a "petition for review" would lie to challenge a deportation order. We believe that both decisions were erroneous in that they failed to give effect to the introductory clause of Section 10 under which its later provisions apply "Except so far as * * * statutes preclude judicial review." The purpose of this clause is to maintain in effect whatever degree of finality Congress has accorded to particular administrative action by other statutes such as the Immigration Act. The legislative history of Section 10 and the general nature of its provisi ns require that full effect be given to its introductory clause.

*The legislative history of Section 10.*—The sweeping judicial review provisions of the Walter-Logan bill were one of the principal reasons for its veto by President Roosevelt in 1940. As the Attorney General pointed out in an analysis accompanying the veto, House Doc. 986, 76th Cong., 3d Sess., p. 11:

> The bill provides that any party to an administrative proceeding who is aggrieved by the final decision of the agency may secure review in a circuit court of appeals or the Court of Appeals for the District of Columbia. Already under existing statutes specific decisions affecting the rights of individuals are made subject to judicial review. This act, however, does not confine review to the specific matters heretofore allowed, but sweeps into the judicial hopper all manner of questions which have never before been considered appropriate for judicial review.

In sharp contrast with the judicial review provisions of the Walter-Logan bill, Section 10 through all of its evolution from the recommendations of the Attorney General's Committee on Administrative Procedure in 1941, has been regarded as a statement of general principles rather than as a broad revision of existing law.

Like the Administrative Procedure Act as a whole, Section 10 had its origin in the recommendations of the Attorney General's Committee on Administrative Procedure in 1941. The majority of the Committee recommended against general legislation dealing with judicial review, and suggested that "When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only

by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change." *Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 92.

The minority members of the Committee desired to go somewhat further, and they drafted as part of their recommendations a section on judicial review which is the ancestor of Section 10 of the Administrative Procedure Act. *Report,* pp. 245–246. However, the minority of the Committee made it clear that it did not entirely disagree with the majority, for the minority members stated that "The situation should be clarified by a statement of legislative policy in no uncertain terms, but at the same time it is unnecessary to go beyond certain simple and recognized principles which have long obtained. The several provisions of this section are designed merely to state a policy * * * without disturbing existing express statutory provisions for or against judicial review". *Report,* p. 245. And they emphasized their position by providing in their proposed section on judicial review that "all statutory provisions specifically precluding judicial review * * * shall remain valid and binding". *Report,* p. 246.

The minority views as to judicial review, which are largely embodied in Section 10 of the Act, were at all times described by their proponents as

a statement of general principles which was not intended to provide a rigid procedure for judicial review applicable to all agencies.[12]

In the 1945 hearings before the House Judiciary Committee, the aims of the proponents of this measure were described even more specifically by Mr. Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law, Sen. Doc. 248, pp. 83–84:[13]

> We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; but we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved—must be preserved. We believe that about all the statute should or could do would be to

[12] The majority and minority members also made similar statements in testifying before the Senate Judiciary Committee in 1941. See *Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, Seventy-seventh Congress, First Session on S. 674, S. 675, and S. 918* (1941), at pp. 838, 845, 849, 850, 1350–1359, and 1400.

[13] Mr. McFarland was one of the minority group on the Attorney General's Committee. Much of the legislative history of the Administrative Procedure Act is compiled in Sen. Doc. 248, 79th Cong., 2d Sess., herein referred to as Sen. Doc. 248.

> state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.

Comparable expressions by the chief legislative supporters of this legislation buttress the conviction that Section 10 of the Administrative Procedure Act was not intended to alter drastically existing modes of judicial review. Thus, Representative Walter, chairman of the subcommittee of the House Committee on the Judiciary which sponsored this legislation, made the following statement on the floor of the House on May 24, 1946, shortly before the bill's enactment( Sen. Doc. 248, p. 369):

> These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provisions for judicial review.

And most pertinently, Senator McCarran, Chairman of the Senate Judiciary Committee, stated (Sen. Doc. 248, p. 311):

> Substantive law, enacted by statute by the Congress of the United States, granting a review or denying a review is not inter-

fered with by this bill. We were not setting ourselves up to abrogate acts of Congress.[14]

The Attorney General previously had made similar explicit statements to the effect that the Section 10 of the Administrative Procedure Act was a restatement of existing law in letters to the Chairman of the Senate[15] and House[16] Judiciary Committees; furnished at their request. The Attorney General's letter and comprehensive analysis were appended to and made part of the final report on this bill by the Senate Judiciary Committee.[17]

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[14] The Senate Judiciary Committee's Print of June 1945, likewise indicated that Section 10 of the Administrative Procedure Act was not designed to supplant existing modes of judicial review, and that "the recognition of the so-called common-law types of review is in accord with the authoritative statement of existing law." Sen. Doc. 248, p. 37.

[15] "This section, in general, declares the existing law concerning judicial review." Sen. Doc. 248, p. 229.

[16] "It [the proposed legislation] also restates the law governing judicial review of administrative action." Sen. Doc. 248, p. 407. This has been the view of the Department of Justice throughout the history of this legislation. Acting Attorney General Biddle took the same position in a memorandum submitted to the Senate Judiciary Committee during the 1941 hearings referred to in note 12, *supra*, at p. 1452. The *Attorney General's Manual on the Administrative Procedure Act* (1947) also declares, p. 93, that: "The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." See also Sen. Doc. 248, p. 415.

[17] Sen. Doc. 248, p. 223, et seq. In another connection, this Court found that such use of a letter from the Attorney General served, "in the absence of contradiction by the re-

We do not contend that Section 10 has no effect upon judicial review of administrative action generally. Nevertheless, it is clear that its provisions were intended to be read with the pre-existing mass of statutory and judicial materials on judicial review. This is required by the generality of the provisions of Section 10, if for no other reason. However, this underlying concept of the section is not left to inference, because by its express terms it leaves intact other statutory provisions giving finality to administrative action, conferring unreviewable discretionary powers upon such agencies, and prescribing the form and venue of judicial review. It is not surprising, therefore, that there is practically no reference in the legislative history to the possible impact of Section 10 upon the established rule that deportation and exclusion orders are reviewable only in habeas corpus proceedings.[18] The general provi-

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port, as an indication of the Committee's opinion on the intended effect" of the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

[18] The only references to judicial review in relation to that process which have come to our attention are the comments of Major Schofield, then head of the Immigration and Naturalization Service, in testifying in the 1941 hearings before the Senate Judiciary Committee, referred to in note 12 *supra*, at p. 569. Major Schofield pointed out that habeas corpus had always provided ample opportunity for review of deportation orders and objected to any enlargement of the opportunities for review in the courts. See also a general approval of proposals to exempt immigration functions by Carl McFarland, speaking for the minority of the Attorney General's Committee. *Id.*, p. 1349, 1390.

sion in the introductory clause, preserving whatever finality or unreviewability the Congress in other statutes had conferred upon particular administrative actions, resolved all such problems of the coverage of Section 10 by reference to existing law.

*The statutory language.*—Section 10 must be related to the operations of many administrative agencies performing diverse functions under statutes in which Congress has made special provisions for administration and review. The only method by which the general principles of Section 10 can be reconciled with other and often detailed arrangements which the Congress has made for judicial review is by giving full effect to the introductory clause of Section 10. The principles of Section 10 govern "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion". It is important to note that the exception in clause (1) is applicable not only where some other statute forbids judicial review altogether, but also "so far as" or the extent to which Congress has forbidden review.[19] For example, many regulatory statutes provide that the agency's order shall be final unless a petition for review is filed in a cir-

[19] The significance of the introductory clause of Section 10 is emphasized by Davis in *The Scope of Review of Federal Administrative Action*, 50 Col. L. R. 559, 561 (1950), and in *The Attorney General's Manual on the Administrative Procedure Act*, 94–95 (1947).

cuit court of appeals within 60 days after the issuance of the agency's order. Clearly, such provisions for finality remain effective pursuant to the introductory clause of Section 10. Similarly, a Federal civil service employee who alleges unlawful removal from office can obtain judicial review only on the question of whether the procedures of the Civil Service Act were followed. *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622. Since the only rights accorded to the employee are these procedural rights, the introductory clause of Section 10 continues to limit judicial review in this area to the question of whether the statutory procedure was followed. Generally, the intended effect of the introductory clause of Section 10 is to provide a dovetailing of the general principles of that section with the specific statutory provisions which the Congress has moulded to particular situations.

It is clear, therefore, that the qualifying introductory clause of Section 10 is not restricted to situations where some other statute precludes judicial review altogether, as in the Act of March 20, 1933 (38 U. S. C. 705), relating to veterans' benefits. Rather, the general principles of Section 10 are inapplicable "*so far as* statutes preclude judicial review". Where the Congress, in an area where it may constitutionally do so, provides that administrative findings of fact shall be conclusive, the general principles of Section 10

will govern the review of questions of law. Where, as in the Immigration Act and the Selective Training and Service Act, the Congress deliberately provides that the administrative decisions shall be "final," the only review permitted by Section 10 is that required by the Constitution—in habeas corpus proceedings. In other words, where the Congress, in the substantive statute involved, has specifically limited the time, mode or scope of judicial review, such provisions are to be given effect under Section 10 by reason of its introductory clause "Except so far as statutes preclude judicial review". Obviously, where the Congress has provided that the administrative decision shall be "final," knowing full well, as we have shown above, that under the Constitution "final" means subject to collateral and limited review in habeas corpus proceedings, that legislative purpose and understanding should be given effect under the introductory clause of Section 10.

There remains the possible argument that the first introductory exception to Section 10 applies only where some other statute expressly and in terms prohibits judicial review, as does 38 U. S. C. 705. Any such contention is completely answered by the legislative history of Section 10. As originally introduced in both Senate and House, it provided for judicial review of agency action "except so far as statutes *expressly* preclude judicial review—" [Italics added] (S. 7, H. R. 1203, 79th

Cong., 1st Sess.). Had Section 10 been enacted in this form, it might be possible to argue that a statutory provision that agency action shall be "final" is not sufficient to "preclude" judicial review. The Senate Committee on the Judiciary, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted without specific explanation, but with the observation that the introductory clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded—* * * where * * * statutes withhold judicial powers."[20] (Sen. Doc. 248, p. 36.) The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said (Sen. Doc. 248, pp. 229–230, 413):

> SECTION 10. This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Ex-

[20] The other introductory exception is "Except so far as * * * agency action is by law committed to agency discretion." See page 15, footnote 2, *supra*.

amples of such interpretation are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297); * * *

In any event, the decisions of this Court and of the court below have made it clear that a statute need not in express terms "preclude" judicial review to come within the introductory clause of Section 10. In *Ludecke* v. *Watkins,* 335 U. S. 160, 163–164, in considering the Alien Enemy Act of 1798, which was completely silent as to judicial review or administrative finality, this Court noted that "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes 'preclude judicial review'. * * * Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. Its terms, purpose, and construction leave no doubt". Similarly, in *Kirkland* v. *Atlantic Coast Line R. R. Co.,* 167 F. 2d 529, certiorari denied, 335 U. S. 843, the court below held that the same reasons that were held to preclude judicial review in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, remained effective to accomplish the same result under the introductory clause of Section 10.

The court below appeared to believe that the only problem under Section 10 was that of the form of the proceeding. That is, it had already concluded that the statutory provision for finality was meaningless because of the availability of habeas corpus (R. 15), and that deportation orders

had been reviewable in declaratory judgment proceedings since *Perkins* v. *Elg, supra*. In fact, it concluded that "Determination of appellant's rights at this juncture detracts not one whit from the administrative process for the Attorney General has already reached his 'final' decision and refused to reconsider it" (R. 19). Clearly, the court below had concluded that the statutory provision for finality had no bearing upon the timing or scope of judicial review, and that the only problem presented was the choice of a convenient form of review under paragraph (b) of Section 10 (R. 16–17). To the contrary, as we have shown, the Congress intended and still intends to accord to the Attorney General's deportation orders such finality as it may do constitutionally, and it has preserved such finality by the introductory clause of Section 10.

We think it clear that nothing in Section 10 (a), (b) and (c) of the Administrative Procedure Act supports the decision below. The introductory clause expressly provides that the following provisions shall not wipe out the provisions of other statutes providing for finality or eliminate the discretion which such statutes as Section 19 (c) of the Immigration Act vest in administrative officers. Paragraph (a) relates to the persons who are entitled to judicial review, paragraph (b) to the form and venue of judicial review proceedings, while paragraph (c) defines the administrative action which is subject to

judicial review. These provisions, like all of Section 10, are subject to the qualifying introductory clause, "Except so far as * * * statutes preclude judicial review". Thus, Section 10 (b) cannot be construed, as it was by the court below, as permitting review here by a suit for a declaratory judgment, on the theory that since Congress had not provided "a special statutory review proceeding" for deportation orders, such a suit was authorized by the reference to "any applicable form of legal action (including actions for declaratory judgments * * *)." Even without the word "applicable", Section 10 (b) must be read subject to the introductory clause of the section. However, the use of the word "applicable" further indicates that the use of common law remedies must be governed by considerations not set forth in the Act. With respect to the review of deportation cases, we need only refer through the introductory clause of Section 10 to the command of the Immigration Act that the decision of the Attorney General shall be "final", to find that the only remaining or "applicable" form of action is in habeas corpus proceedings. Thus, the reference in paragraph (b) to declaratory judgments actions, like the reference to habeas corpus proceedings, is only illustrative of the remedies which may be applied under appropriate circumstances, as they have in the past, where the Congress has neither precluded review nor made special review arrangements.

Similarly, the introductory clause of Section 10 limits the provision of paragraph (c) that "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review". At the most, this can only mean that administrative action, as to which Congress has neither precluded review nor made express provision for review, shall be subject to judicial review.[21] That it is subject to the introductory clause is evident from the explanation in the Senate Comparative Committee Print, as follows: "the so-called nonstatutory or common-law type of review was recognized by the Attorney General's Committee as properly obtaining wherever special statutory review is not provided by Congress and legislation does not indicate that judicial review is precluded or withdrawn. The exceptions stated in the introductory clause of section 10 appear to set forth the proper type of issues not subject to judicial review." Sen. Doc. 248, pp. 37–38.

It is clear, therefore, that the introductory clause of Section 10 was intended to leave intact whatever degree of finality the Congress had given to particular administrative action by other statutes. The finality accorded to the Attorney General's orders in alien deportation cases by Section 19 of the Immigration Act can be pre-

[21] This construction is urged by Dickinson in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947) pp. 562–564.

served only by restricting the mode, timing and scope of judicial review of such proceedings to the collateral review available in habeas corpus proceedings. In habeas corpus proceedings, an alien facing deportation can raise every question that he would be entitled to raise in an action such as the present one.[22]

E. The Practical Consequences of the Decision Below Also Require Its Reversal

In support of its decision, the court below stated that "To compel him (the respondent) to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country" (R. 18).

It is of course true that the alien must be taken into custody before he can commence habeas corpus proceedings. Also, the courts usually do not grant bail when the writ is first applied for as the expedited proceedings are usually completed quickly. However, if the proceedings are prolonged or upon appeal to the higher Federal

[22] Among the cases in which habeas corpus proceedings have been utilized to question orders denying suspension of deportation are *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *Walther* v. *District Director*, 175 F. 2d 693 (C. A. 2); *Bartsch* v. *Watkins*, 175 F. 2d 245 (C. A. 2); *Sleddens* v. *Shaughnessy*, 177 F. 2d 363 (C. A. 2); *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C. A. 2); *Zabadlija* v. *Garfinkel*, 173 F. 2d 222 (C. A. 3); *Petition of Kavadias*, 177 F. 2d 497 (C. A. 7); *Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2).

courts, bail is normally allowed, as in such cases as *Bridges* v. *Wixon,* 326 U. S. 135, and *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. See also Rule 45 of the Rules of this Court. Most important of all, even after the deportation order has been upheld in habeas corpus proceedings, the alien may and frequently does obtain from the Immigration and Naturalization Service a postponement of his actual deportation together with a temporary release from custody in order to wind up his affairs. Thus, his situation in habeas corpus would not be appreciably different from what it was previously when he was at liberty on bail pending determination of the administrative proceeding. Of course, when his objections are finally unsuccessful, there will come a time when he must wind up his affairs. But that is a contingency which he must anticipate and plan to meet.

In contrast to the relatively minor inconvenience imposed upon a small number of aliens are the practical burdens which the decision below would impose upon the courts and upon the Immigration and Naturalization Service. In the fiscal year 1949, 20,040 aliens were deported from the United States pursuant to formal deportation orders, while 276,000 deportable aliens departed voluntarily. *The Immigration and Naturalization Systems of the United States,* a report of the Senate Committee on the Judiciary, Sen. Rep. 1515, 81st Cong., 2d Sess. (1950), p. 864. Of these 20,040 formal deportations, 16,430 were to

Mexico and Canada upon the ground of illegal entry or stay (i. e., previously deported or excluded, remaining longer than authorized, entered without proper documents or without inspection or by false statements.) *Annual Report of the Attorney General* (1949), p. 700. During the same year, hearings were completed in 13,062 deportation cases. Also during the fiscal year 1948,[23] the Federal courts disposed of 258 writs of habeas corpus in deportation cases as follows: sustained 26, dismissed 149, while 83 were withdrawn. *The Immigration and Naturalization Systems of the United States,* p. 870. These statistics strongly indicate that in a large proportion of the cases habeas corpus proceedings may have been utilized solely for purposes of delay.

Habeas corpus proceedings are expedited, 28 U. S. C. 2243, thus minimizing the opportunity and temptation for using the writ for purposes of delay. However, if suits for declaratory judgment may be employed to challenge deportation orders, they apparently must be brought in the District of Columbia where the Attorney General and the Commissioner of Immigration have their official residences. At any rate, the Courts of Appeals for the Second and Third Circuits have

[23] Figures for 1948 are used because they were more typical than the 1949 habeas corpus data, which were distorted by the inclusion of a large number of cases relating to alien enemies.

so held. *Connor* v. *Miller*, 178 F. 2d 755 (C. A. 2); *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3). In contrast, the writ of habeas corpus can issue only in the district in which the alien is detained for deportation. *Ahrens* v. *Clark*, 335 U. S. 188.

It is important to note that suits for declaratory judgment are not required to be expedited as are habeas corpus proceedings.[24] Moreover, such suits will be brought in the District of Columbia where civil actions already encounter a calendar delay of more than 15 months after issue is joined. *Annual Report of the Director of the Administrative Office of the United States Courts* (1949) p. 112. It is apparent, therefore, that because of these venue and calendar consideration a suit for a declaratory judgment would offer far greater possibilities for delaying tactics than does a habeas corpus proceeding. Moreover, since declaratory judgment actions fall into the stream of general litigation, they would encounter other delays incident to formal pleadings, joiner of issue, motions, calendars, formal trials, etc. We can only conclude that if the decision below is upheld there will be filed in the District of Columbia a large number of suits for declara-

[24] It is true that Rule 57 of the Federal Rules of Civil Procedure permits the advancement of declaratory judgment suits. But this dispensation, we are informed, is seldom invoked and seldom granted. Courts are reluctant, in the absence of a showing of extraordinary need, to accord one case priority over others.

tory judgment, perhaps exceeding the present total volume of habeas corpus proceedings in deportation cases, for the purpose of delaying deportation. This purpose would be achieved by merely filing a complaint. It should be noted that the possibilities of delay thus created would logically be equally available to aliens held for exclusion from the United States, a process which has heretofore been subject to challenge only in habeas corpus proceedings.

Another practical reason for limiting the challenge of deportation orders to habeas corpus proceedings is that many deportation orders are not executed, e. g., because of the existence of war or because no other country will receive the aliens involved. As of April 15, 1949, there were 3,278 warrants of deportation which were not enforceable. Also, of these 3,278 deportation orders, 1,293 were based upon immoral or criminal charges and 112 were issued under the Act of October 16, 1918, as amended, which relates to subversive classes. *The Immigration and Naturalization Systems of the United States,* p. 639. While figures are not available, we believe that deportation orders based upon such serious grounds would account for a considerable portion of both the cases in which habeas corpus proceedings are brought and the cases in which the alien is never actually taken into custody for deportation because deportation is impossible. If judicial review is made available in a suit for

a declaratory judgment as soon as the deportation order is issued, such review will probably be had in a considerable number of cases in which deportation would not actually take place in any event.[25] Thus, judicial intervention is premature until the alien is taken into custody. This situation is comparable to that of a person finally classified by a selective service board who attempts to obtain judicial review of that classification before effort is made fully to execute the order.[26] Cf. *Falbo* v. *United States*, 320 U. S. 549, 553; *Estep* v. *United States*, *supra*.

Finally, it should be noted that the remedy of declaratory judgment made available by the decision below is in addition to, not in place of, the remedy of habeas corpus. There is nothing to prevent the respondent or any other alien who fails in his challenge to a deportation order in a suit for a declaratory judgment, from bringing a habeas corpus proceeding to test the validity of his detention under the same deportation order. We cannot believe that by enacting either the Declaratory Judgment Act or the Administrative

[25] These considerations are graphically illustrated in plaintiff's own situation. Although an order of deportation was entered against him May 5, 1941, the immigration authorities have not yet actually attempted to execute that order.

[26] Of course, selective service functions are expressly excluded from the orbit of the Administrative Procedure Act. Sec. 2 (a), Administrative Procedure Act, 5 U. S. C., Supp. II, 1001 (a); Sec. 13 (b), Selective Service Act of 1948, 50 U. S. C. App. (Supp. III) 463 (b). However, no such express exception is found in the Declaratory Judgment Act.

Procedure Act the Congress contemplated that it was providing repeated judicial review for administrative orders which it had declared to be "final."

## III

### THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT'S CLAIMED EXEMPTION FROM MILITARY SERVICE AS A NEUTRAL ALIEN DID NOT MAKE HIM INELIGIBLE FOR SUSPENSION OF DEPORTATION

Assuming that we are in error as to the jurisdictional matters discussed above, we believe that the court below erred in its conclusion that the respondent was not ineligible for naturalization pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, and was therefore eligible for suspension of deportation pursuant to Section 19 (c) of the Immigration Act. The latter provision authorizes suspension of the deportation of an otherwise deportable alien only if such alien is eligible for naturalization. It is admitted that the respondent is a deportable alien.

Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provided at the time here involved that "every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States." Recognizing the general practice of nations not to conscript neutral

aliens,[27] Section 3 (a) provided an exemption from military service for any neutral alien applying for such exemption, and further provided that any such alien "shall thereafter be debarred from becoming a citizen of the United States." It is admitted that the respondent made appropriate application on Form DSS 301 for exemption as a neutral alien and that thereafter he enjoyed complete exemption from military service.

Nevertheless, the court below held that the respondent was not "residing in the United States" within the meaning of Section 3 (a) when he claimed such exemption, was therefore never liable for military service, and that thus his claim of exemption does not bar him from naturalization (R. 20, 24). Its conclusion that the respondent was not "residing in the United States" is based upon the following circumstances (see statement of facts, *supra*, pp. 6, 10): the respondent, a Danish citizen, legally entered the United States as a temporary visitor in August 1939. In May 1940, deportation proceedings were commenced against him, and in May 1941 he was ordered deported to Denmark, but deportation was deferred until the cessation of hostilities. On or about March 1942, he applied for exemption from military service as a neutral alien. Declaring that residence connotes choice,

[27] III Hackworth, *Digest of International Law*, p. 58. A similar provision was added in 1918 to the Selective Draft Act of 1917, 40 Stat. 76.

the consent of the sovereign, and a degree of permanence in the abode, the court below concluded that the respondent had not been "residing in the United States" in that he was a temporary visitor, under order of deportation, and unable to leave this country by reason of the war.

The court below found it unnecessary to reach respondent's contention that he executed Form DSS 301 as the result of misunderstanding as to its consequences,[28] and that contention will become relevant only if his assertion of non-resident status is unsuccessful. In that event, the Gov-

[28] The court also found it unnecessary to consider respondent's belated suggestion that he was not bound by the consequences of his Form DSS 301 because Denmark actually was not a neutral (R. 19–20, note 6). We doubt that respondent is in a position to make such a contention at this time, since the application for exemption was granted upon his own representation that he was a neutral alien and since he never at any time contended before the Selective Service authorities or the immigration authorities that he was not a neutral alien. On its merits, the claim seems entirely insubstantial. The determination of neutrality, like the determination of belligerency, is a political question which must be resolved by the President or the agency designated by him. *The Nueva Anna*, 6 Wheat. 193; *Ludecke* v. *Watkins*, 335 U. S. 160; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; 1 Hyde, *International Law* (Second Rev. Ed.) 198. In administering the Selective Service Act, the President empowered the Director of Selective Service to make such political decisions on his behalf. Local Board Memorandum No. 112, issued March 16, 1942, classified Denmark as a neutral nation and no change was made in that classification throughout the war. That classification enabled respondent to obtain relief from military service upon his own application. We submit that such a political determination is not open to judicial inquiry, particularly at this time.

ernment asks that the case be remanded for determination of the specific factual issue, upon which it is prepared to submit documentary evidence, presented by respondent's claim that he did not understand the effect of his plea for exemption. Accordingly, we will limit our argument here to the issue of residence upon which the court below based its decision, and to the effect of his claim of exemption from military service.

In pressing for favorable consideration of his application for suspension of deportation, respondent's claims present a number of irreconcilable contradictions. On the one hand, he states that he was never a resident of the United States and thus not liable to conscription. On the other hand, he asserts that he always desired to be a citizen of the United States and, presumably, to continue his residence in this country, and that he would never have knowingly surrendered the privilege to become a citizen of the United States. Facing in still another direction, respondent pleads for permission, through suspension of deportation, to continue residing in the United States, urging that in the many years of his "non-residence" in the United States he has established close family ties and a financial stake in this country.

In all the years of his dealings with the selective service and immigration authorities, ~~petitioner~~ respondent never claimed at any time that he was not residing in the United States. He made no such

claim when he complied with the original call for Selective Service registration on October 16, 1940, and registered at that time without any protest. He likewise did not suggest any such objection when he filed his DSS 301 in 1942 and actually obtained exemption from military service. Nor has he alleged in his complaint here that he was not then, or is not now, a resident of the United States. He never solicited a ruling from the Selective Service authorities that he was a non-resident alien and not subject to military service.[29] If he had made such an application and had been denied exemption, the findings of the local board would have been subject to judicial review only if they were without basis in fact. *Cox* v. *United States,* 332 U. S. 442; *Estep* v. *United States,* 327 U. S. 114. It is evident that respondent did not take advantage of the administrative remedies available to him and we do not believe he can complain now. See. *Falbo* v. *United States,* 320 U. S. 549.

[29] The complaint alleges (R. 4) that on November 19, 1946, more than a year after hostilities ended, respondent applied to his local board to withdraw his Form DSS 301, stating that it was filed as the result of misapprehension. That effort was prompted apparently by his pending application for suspension of deportation, during the course of which he learned that his Form DSS 301 might preclude his desire to remain in the United States. Respondent made no representation in his application to the local board in 1946 that he was a non-resident of the United States at the time of filing his DSS 301, nor did he make such a claim at any time before his case was presented to the court.

Throughout the war years, respondent enjoyed the exemption from military service which had been granted upon his application. Under the terms of the statute, an alien who applied for and obtained such exemption was thereafter barred from American citizenship. The statute did not prescribe for disqualification only in the case of a resident alien who filed such an application for relief from military service but declared that "any person who makes such application" shall be barred from United States citizenship. By filing the application and accepting relief from military service, respondent incurred the unconditional disqualification of the statute. Having availed himself of the benefits produced by his own application, it seems to us that elementary principles of equity require that respondent be defeated in his present belated attempt, long after hostilities have ended, to escape the disabilities which were equally inherent in his course of conduct. See *Savorgnan* v. *United States,* 338 U. S. 491.

The coverage of the registration and service requirements of the Selective Training and Service Act of 1940 should be interpreted in the light of its single objective of making available for military service the maximum number of men. In the absence of clear Congressional intent to the contrary, the niceties of residence and domicile should not be permitted to obstruct that fundamental objective. In naturalization usage

residence customarily presupposes lawful admission for permanent residence. *Zartarian* v. *Billings,* 204 U. S. 170; *Chow Gin* v. *United States,* 175 F. 2d 299 (C. A. 7); *Knauff* v. *McGrath,* 181 F. 2d 838 (C. A. 2). On the other hand, the immigration laws take into account, for some purposes, both legal and illegal residence. Thus a person whose residence is irregular, like respondent's here, may legalize his status through an application for suspension of deportation, or for relief under the so-called Seventh Proviso to Sec. 3 of the Immigration Act of 1917, 8 U. S. C. 136 p. Indeed, a recent amendment to the statute authorized suspension of deportation in the cases of aliens who have maintained an irregular "residence" in the United States for 7 years. Act of July 1, 1948, 62 Stat. 1206. Usages in other statutes depend entirely on the legislative purpose.

It is not denied that the Congress could have subjected those persons in the respondent's position to liability for military service under Section 3 (a). *Leonhard* v. *Eley,* 151 F. 2d 409 (C. A. 10). The only question is whether it did so. As originally enacted on September 16, 1940, 54 Stat. 885, Section 2 required registration under the Act of "every male citizen of the United States, and of every male alien residing in the United States". Section 3 (a), as originally enacted, imposed liability for training and service

upon male citizens and upon "every male alien residing in the United States who has declared his intention to become such a citizen" (i. e., declarant aliens). It is clear that under the original Section 3 (a) the respondent was not liable for military service. It is equally clear that he was obliged to register, as he did. When the orginal Act was under consideration in 1940, Senator Sheppard, Chairman of the Senate Military Affairs Committee, explained that it was deemed desirable to require the registration of all aliens, including those not required to serve, in order that their skills and capacities might be catalogued for possible future use. 86 Cong. Rec. 1093. When the bill was considered on the floor of the House, several Members called attention to the many recent refugees enjoying the protection of the United States and urged that they be required to serve as well as to register. But an amendment seeking to accomplish this aim was defeated. 86 Cong. Rec. 11371, 11390, 11664–11667.

However, on December 20, 1941, shortly after the Pearl Harbor attack, Congress amended Sections 2, 3 (a) and 5 (a) to change completely the handling of neutral aliens (55 Stat. 844). Sections 2 and 3 (a) were amended to apply the obligations of registration and service to citizens and "every other male person residing in the United States", thus dropping the earlier restriction of

the service obligation to declarant aliens.[30] Broadening the service obligations to include non-declarant as well as declarant aliens was bound to create questions of coverage because of the inevitable existence of classes of non-declarant aliens who could not be subjected to our military service. By this amendment, Congress made it clear that it intended to make the Act potentially applicable to every male alien. At the same time, it indicated that it was aware that some classes of non-declarant aliens must be excepted. It provided for the latter problem by amending Section 5 (a) to authorize the President to prescribe exempt categories of "persons * * * residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States", i. e., non-declarant aliens. There is no doubt as to the intended relationship between the amendments to Sections 3 (a) and 5 (a). In reporting the 1941 amendments, the House Military Affairs Committee stated, H. Rep. 1508, 77th Cong., 1st Sess., p. 4, that the amendment (No. 2) removing the limitations on requiring the service of non-declarant aliens was intended to reach

[30] The substitution of "persons" for the term "aliens" was intended to make certain that the statute would encompass both aliens and noncitizen nationals, as well as American citizens. 87 Cong. Rec. 9934, 10055, H. Rep. 1554, 77th Cong., 1st Sess. In the same amendment, the military authorities also were given authority to rejecte any enemy aliens whom they regarded as unsuitable for service.

"every male alien between such ages who has not declared his intention to become a citizen of the United States." The Committee added:

> The amendment made by section 2 of the committee amendment should be considered in connection with the amendment made by section 4, under which the President is given power to relieve such aliens who have not declared their intention to become citizens of the United States as he deems advisable from the registration requirements and from liability for service.

Without more, it would seem to be clear that when the Congress extended the service obligations of Section 3 (a) to non-declarant aliens it left the inevitable problem of inclusion and exclusion of particular classes of aliens to the President's determination under the power which the Congress simultaneously gave to him, rather than to interminable litigation over residence and domicile. And it could do this only by covering all aliens in the United States and leaving it to the President to create the necessary exceptions.[31] That this is what the Congress intended and did finds confirmation not only in the legislative history referred to above but also in the administrative construction of the Act.

[31] A contemporaneous legislative expression, requiring the registration and fingerprinting of all aliens in the United States for 30 days or longer, regardless of the apparent permanence of their immigration status, is found in Sec. 31 of the Alien Registration Act of June 28, 1940, 8 U. S. C. 452.

Shortly after enactment of the original 1940 Act, Attorney General Jackson was asked to determine whether the term "male alien residing in the United States" as used in Section 2 embraced various enumerated categories of aliens temporarily in the United States. Among the categories enumerated in the inquiry were "aliens on an immigration status which limits their sojourn in the United States to a specified future date, or to the happening of a specific contingency, and during which period such persons are under the supervision of the immigration authorities."[32] In a published opinion, the Attorney General concluded that the statute encompassed persons admitted under the immigration laws as temporary visitors and that "every alien * * * who lives or has a place of residence or abode in the United States, temporary or otherwise", was subject to the command of the statute. 39 Op. Atty. Gen. 504.

[32] The inquiry and the opinion covered the following classes of aliens:

"Temporary alien visitors for business or pleasure; transient aliens; bona fide alien seamen entering the United States temporarily in pursuit of their calling as seamen; treaty aliens; alien university students; and aliens on an immigration status which limits their sojourn in the United States to a specified future date, or to the happening of a specific contingency, and during which period such persons are under the supervision of the immigration authorities; also aliens who have been admitted into the United States as officials of a foreign government; and aliens who are in the United States and who have diplomatic status and immunity under the definitions of the State Department."

Following this opinion of the Attorney General, the Selective Service authorities always have adhered to the interpretation that the statute's command reached any alien who lived or had a place of residence or abode in the United States, regardless of the insecurity of his immigration status. That reading of the statute was incorporated in the Selective Service Regulations issued soon after the 1941 Amendments, which had made the statute broadly inclusive in regard to service as well as registration. 32 CFR 611.12, issued Feb. 7, 1942, provided that every male alien in the United States is to be regarded as a "male person residing in the United States" unless he fell within one of the categories mentioned in Sec. 611.13. Sec. 611.13 exempted various officers and employees of foreign governments and aliens who remained in the United States for less than 90 days. Subsection (b) of that section directed that any member of the latter group and any alien then in the United States might achieve nonresident status if he filed an application for determination of nonresidence (Form DSS 302) and obtained such a determination. Sec. 611.21, promulgated March 16, 1942 (about two weeks before the respondent filed his application for exemption on Form DSS 301),[33] authorized the filing of a Form DSS 302 within 90 days after

[33] The selective service records indicate that he filed his claim for exemption from military service on or about March 30, 1942.

entry or, in the case of those already in the United States, prior to May 16, 1942, in order to obtain a determination of nonresidence. Sec. 611.22 provided for determination of residence status by the local board and for a determination also as to the length of time applicant might remain in the United States without being regarded as a "male person residing in the United States." Sec. 611.23 provided for appeal to the Director of Selective Service. Sec. 611.21–1, which became effective June 27, 1945, allowed filing of the application for nonresident status at any time.

Thus, it appears that the court below misread the regulations in asserting (R. 24, fn. 13) that they did not give respondent, who had entered the United States more than three months previously, a right to claim nonresident status. Actually the regulations permitted him to file a claim to such status prior to May 16, 1942, two months after the regulation was promulgated, and for almost 1½ months after he filed his DSS 301. After June 27, 1945, he was permitted to file application for a determination of such nonresident status at any time. He never filed such an application and under the express requirement of the regulations he must be deemed a "male person residing in the United States."

The regulations issued by the President under the authority of Sections 5 (a) and 10 of the Selective Training and Service Act have the force

of law. The administrative reading of the statute thus has consistently regarded a person in respondent's position as within the reach of the Selective Training and Service Act. It is well established that such a consistent, unquestioned administrative construction is a true guide to interpretation, and should not be disturbed unless clearly fallacious. *United States* v. *Hill,* 120 U. S. 169; *Costanzo* v. *Tillinghast,* 287 U. S. 341; *Billings* v. *Truesdell,* 321 U. S. 542. And even more decisive is such a construction when Congress frequently has amended the statute without questioning the interpretation or revising the pertinent language.[34] *Helvering* v. *Winmill,* 305 U. S. 79; *Brewster* v. *Gage,* 280 U. S. 327. Indeed, in the current Selective Service Act of 1948, Secs. 3 and 4, 50 U. S. C. App. (Supp. III) 453 and 454, Congress has reenacted the identical language prescribing liability for registration and service of "every other male person residing in the United States."

The administrative construction of the statute has enlisted strong support in the decision of the Court of Appeals for the Second Circuit in *Benzian* v. *Godwin,* 168 F. 2d 952, certiorari de-

[34] In addition to the 1941 Amendment, the Selective Training and Service Act of 1940 was amended June 23, 1942, 56 Stat. 386; July 28, 1942, 56 Stat. 724; Nov. 13, 1942, 56 Stat. 1018; Dec. 5, 1943, 57 Stat. 596; July 12, 1943, 57 Stat. 518; June 25, 1943, 57 Stat. 164; June 28, 1944, 58 Stat. 544; Dec. 8, 1944, 58 Stat. 798.

nied, 335 U. S. 886, which considered contentions quite similar to those advanced by the respondent here. The plaintiff in that case was in a stronger position since he had taken advantage of the appropriate administrative remedies and had applied to the Selective Service authorities for a determination that he was not a "male person residing in the United States." Nevertheless, the Court of Appeals for the Second Circuit rejected the plaintiff's contention that the Selective Service Act did not apply to him because he had been admitted as a temporary visitor. The court declared (168 F. 2d at 956):

> It appears from the use of the phrase "every other male person residing in the United States," in both §§ 2 and 3 (a) of the amended Act, that Congress intended that everyone who was subject to registration should also be liable for service, unless he came within the categories specifically exempted by the Act. Congressional reenactment of substantially the same phrase concerning residence in § 2, after it had been interpreted by the Attorney General, indicates Congressional approval of that interpretation. It would follow, then, that since appellant was subject to registration under the Attorney General's interpretation, Congress intended him to be subject to registration under the amended Act. And if he was subject to registration he was also liable for serv-

> ice, unless (1) he applied for exemption as a neutral under § 3 (a) or (2) came within the category of an alien non-resident as determined by the Director of Selective Service by Regulation 611.13, promulgated under the authority of § 5 (a) of the Act.

Additional confirmation is found in *United States* v. *Haug*, 150 F. 2d 911 (C. A. 2). There the court held that a Norwegian seaman, whose temporary stay in the United States extended beyond three months, was subject to the requirements of the Selective Training and Service Act. The Court pointed out that he could have filed an application for exemption as a non-resident, and that his failure to do so foreclosed him from urging that the Selective Service requirements were not applicable to him.[35]

The sole remaining question is whether respondent was excused from liability for military service because an order of deportation was entered against him on May 15, 1941. The court below laid great stress upon this circumstance, declaring

[35] The case of *Ex parte Ghosh*, 58 F. Supp. 851 (S. D. Cal.) is not inconsistent with these holdings. In that case an alien student who had been classified on three occasions as a non-resident, was subsequently reclassified and declared to be a resident of the United States. The Court held that the latter action was unwarranted and arbitrary and stated (p. 857) that:

"The local board acted * * * without any supporting evidence and, I might say, in an arbitrary and capricious manner."

that it had deprived him of the "volition necessary to residence," that the "sovereign had withdrawn its consent" by issuing the deportation order, and that what remained was only the "purely ministerial act of deportation." (R. 25).

The obligations of the Selective Service Act do not rest upon any theoretical "consent of the sovereign" but on whether respondent actually was residing or had a place of abode in the United States. If his residence was dependent on personal volition, such volition certainly would not be affected by an order of deportation which was not being executed and indeed has not yet been executed. After 9 years of continued stay, it hardly can be said that the execution of the deportation order was merely ministerial. And if any consent of the sovereign were required, it would appear to have been granted by the direction that execution of the deportation order be deferred for the duration of the war. Thus respondent was permitted to remain in the United States and his situation was substantially the same as that of any temporary visitor who had overstayed his allotted period.

During the war years, there were many persons in the United States who had been admitted as temporary visitors. Many of them, like respondent, became technically subject to deportation because they were compelled to accept employment. However, the restrictions against employ-

ment were modified [36] and such refugees from the war were never in danger of being deported as long as the war lasted. Many of them established family ties in this country and were able to legalize their status in the United States through suspension of deportation or some other available process. Many others became members of the United States military forces and welcomed the opportunity to obtain the grant of American citizenship which thereupon became available to them. Secs. 7401 and 324 (a) of the Nationality Act of 1940, as amended, 8 U. S. C. 1001 and 724 (a).[37]

Respondent was not subject to an order of deportation at the time he registered as a resident alien. If he had desired to claim non-resident status, after the order of deportation was entered, he could have done so before May 16, 1942, or after June 27, 1945, and obtained a determination as to his residence status. This he did not do. If he had wished, as he now declares, to become a citizen of the United States, he could have achieved that ambition most expeditiously by submitting to induction into the armed forces of this country. Instead, he chose a third course,

[36] On September 11, 1942, these requirements were relaxed and temporary visitors were permitted to accept employment for the war's duration.

[37] The extension of such naturalization benefits to persons who entered as temporary visitors represents further evidence of a recognition by Congress that such persons were liable to service in the

which the law permitted, of claiming relief from military service as a neutral alien and surrendering the privilege of obtaining American citizenship.

The existence of the deferred and still unexecuted order of deportation seems to us to have no relevancy here, despite the court's tenuous assertions regarding the "consent of the sovereign". We believe that it is unrealistic to hold that an alien who had lived in the United States for almost three years at the time he sought exemption from military service, and who asserts now (after an aggregate stay of 11 years) that he wishes to remain indefinitely, was not to be deemed a resident for the purposes of the Selective Service Act although he has maintained a home in this country for all those years, has been employed constantly, and has established close family ties here. Moreover, it seems to us entirely unconscionable that such an alien should be permitted to elude the penalty he voluntarily undertook in exchange for exemption from military service.

In our view the legislative purpose is clear and unmistakable. Respondent did have a residence or place of abode in the United States during the crucial period and enjoyed the protection of the United States during the years of hostilities. He did seek and obtain exemption from military service as a neutral alien. He should endure the

consequences that the Congress attached to the exemption.

CONCLUSION

The judgment should be reversed upon the jurisdictional grounds (1) that it relates to administrative action which, because it is subject to the approval of Congress, cannot be made the subject of Federal judicial action, and (2) that the decision of the Attorney General in deportation proceedings may be challenged only in habeas corpus proceedings. Even if the courts below possessed jurisdiction in this case, the judgment should be reversed upon the substantive issue of the respondent's eligibility for suspension of deportation. In that event, we respectfully submit that the case should be remanded for consideration of the question, not decided by the court below, as to the truth and effect of the respondent's contention that he was misled as to the consequences of claiming exemption from military service as a neutral alien.

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SEPTEMBER 1950

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No. 34

# In the Supreme Court of the United States

OCTOBER TERM, 1950

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

# INDEX


| | Page |
|---|---|
| 1. The ineligibility for citizenship imposed by Section 3 (a) of the Selective Training and Service Act of 1940 has not been terminated | 1 |
| 2. The status of Denmark during World War II | 10 |
| 3. The respondent's Selective Service classification | 11 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Benzian* v. *Godwin*, 168 F. 2d 952 | 10 |
| *Great Northern Ry. Co.* v. *United States*, 208 U. S. 452 | 8 |
| *Hertz* v. *Woodman*, 218 U. S. 205 | 8, 9 |
| *Lau Ow Bew* v. *United States*, 144 U. S. 47 | 3 |
| *Petition of Otness*, 49 F. Supp. 220 | 6 |
| *Samowich, In re*, 70 F. Supp. 273 | 6 |
| *United States* v. *Carter*, 171 F. 2d 530 | 9 |
| *United States* v. *Reisinger*, 128 U. S. 398 | 9 |
| *Urmeneta, In re*, 42 F. Supp. 138 | 6 |
| Statutes: | |
| Act of February 11, 1931, 46 Stat. 1087 | 5 |
| Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201 et seq.): | |
| Sec. 13 (c) | 5 |
| Sec. 28 | 5 |
| Immigration Act of 1924, as amended October 29, 1945 (59 Stat. 551): | |
| Sec. 28 (c) | 6, 9–10 |
| Nationality Act (54 Stat. 1137, 1172; 8 U. S. C. 904), Sec. 504 | 6 |
| Public Resolution 64, of March 3, 1921, 41 Stat. 1359 | 4 |
| Selective Draft Act of 1917, as amended (40 Stat. 76, 884), Sec. 2 | 3 |
| Selective Training and Service Act of 1940, as amended (54 Stat. 885, 55 Stat. 844): | |
| Sec. 3 (a) | 1, 2, 3 |
| Sec. 16 (b) | 1, 2, 9 |
| Selective Training and Service Act of 1940, as amended by the Act of May 9, 1945 (59 Stat. 166) | 7 |
| Selective Training and Service Act of 1940, as amended by the Act of May 19, 1946 (60 Stat. 181) | 7 |
| Selective Training and Service Act of 1940, as amended by the Act of June 29, 1946 (60 Stat. 341, 342) | 7 |
| Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. App., Supp. III, 454, Sec. 4 (a) | 3 |
| 1 U. S. C., Supp. III, 109 | 8, 9 |

| Statutes—Continued | Page |
|---|---|
| 1 U. S. C. 29 | 8 |
| 8 U. S. C. (1925 ed.) 366 | 5 |
| 8 U. S. C. (1931 ed.) 366a | 5 |
| Miscellaneous: | |
| III Hackworth, *Digest of International Law*, 598 *et seq* | 4 |
| H. Rep. 910, 71st Cong., 2d Sess | 5 |
| *Interpretation No. 1*, Immigration and Naturalization Service | 6 |
| *Secona Report of Provost Marshal General* (1919), p. 3 | 4 |
| Sen. Rep. 923, 71st Cong., 2d Sess | 5 |

# In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 34

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

PEDER KRISTIAN KRISTENSEN, ALSO KNOWN AS PETER KRISTEN KRISTIANSEN, ALSO KNOWN AS PETER CHRISTENSEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

In this reply brief, we shall consider only certain issues raised by the respondent's brief.

1. *The ineligibility for citizenship imposed by Section 3 (a) of the Selective Training and Service Act of 1940 has not been terminated.* The respondent and the amicus curiae contend that the ineligibility for citizenship which Section 3 (a) of the Selective Training and Service Act, as amended, imposed upon neutrals who claimed exemption from military service, expired on March 31, 1947, pursuant to Section 16 (b) of the Act. Section 16 (b), as amended, reads as follows:

> The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8 and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. [54 Stat. 897, 59 Stat. 166, 60 Stat. 181, 342, 50 U. S. C. App. § 316 (b).]

The Government contends that this bar to citizenship continues in effect notwithstanding the provisions of Section 16 (b).

It is clear that in Section 3 (a) Congress intended to penalize any neutral alien who claimed exemption from military service by providing that he "shall *thereafter* be debarred from becoming a citizen of the United States" (Emphasis supplied). The ineligibility for citizenship became complete and final when the neutral alien applied for and obtained exemption from military service. In view of the purposes of the Selective Training and Service Act, it is inconceivable that the Congress intended this ineligibility for citizenship to endure for only the period of hostilities during which the alien enjoyed freedom from military

service. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absured conclusion." *Lau Ow Beu* v. *United States,* 144 U. S. 47, 59.

However, the Congress has not left its purpose to inference. Such bars to citizenship have appeared in Section 2 of the Selective Draft Act of 1917, as amended (40 Stat. 76, 884), in Section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 55 Stat. 844), and in Section 4 (a) of the Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. App., Supp. III, 454). Without more, this consistent legislative policy to deny citizenship to neutral aliens who claim exemption from service clearly indicates that Congress intended such bars to be permanent except where it affirmatively acts to end the bar. This is made particularly clear by the history of the disqualification for citizenship imposed by the Selective Draft Act of 1917, as amended.

During World War I, liability for military service was extended only to aliens who had declared their intention to become American citizens. In 1918, Section 2 of the Selective Draft Act was amended (40 Stat. 885) to provide that

> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from

> liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.[1]

There was no specific statute terminating the World War I Selective Draft Act. The local boards organized under that statute ended their activities December 10, 1918, and their records were thereafter sealed. *Second Report of Provost Marshal General* (1919), p. 3. The only legislative termination appears to have been accomplished by Public Resolution 64 of March 3, 1921, 41 Stat. 1359, which was the resolution terminating World War I and ending statutes which were dependent upon the termination of that conflict.[2]

However, by subsequent legislation the Congress clearly indicated that it regarded the bar to citizenship incurred by neutral aliens under Section 2 of the 1917 Act as remaining in effect

[1] For the reasons leading to this amendment, see III Hackworth, *Digest of International Law*, 598 et seq.

[2] A proviso, 41 Stat. 1360, stipulated, "That nothing herein contained shall be construed as effective * * * to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statute, p. 76), of any person who failed to comply with the provisions of said Act, or Acts amendatory thereof."

indefinitely, notwithstanding the general expiration of that statute. First, the ineligibility to citizenship was carried into the 1925 edition of the United States Code as Section 366 of Title 8. In 1931, Congress recognized the continuing nature of this ineligibility in limiting its future application by providing (Act of February 11, 1931, 46 Stat. 1087):

> That, notwithstanding any provision of law to the contrary, no alien shall be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become a citizen of the United States in order to secure discharge from the military service, if such withdrawal (and the application therefor) and discharge took place after November 11, 1918.

The reports of both the House and Senate Committees, which considered this 1931 legislation, expressly recognized the continuing nature of the disqualification imposed by the 1918 statute. H. Rep. 910, Senate Rep. 923, 71st Cong., 2d Sess. The 1931 Act was codified as 8 U. S. C. 366a.

In the meantime, in Section 28 (c) of the Immigration Act of 1924 (43 Stat. 153, 168; 8 U. S. C. 224 (c)), Congress defined the term "ineligible to citizenship" for the purposes of that statute as including any alien ineligible for citizenship under Section 2 of the Selective Draft Act of 1917, as amended.[3]

[3] Under Section 13 (c) of the Immigration Act of 1924 (8 U. S. C. 213 (c)), such aliens were excluded from the United States.

It was not until 1940, that the Congress, in Section 504 of the Nationality Act (54 Stat. 1137, 1172, 8 U. S. C. 904) specifically repealed the proviso in Section 2 of the Selective Draft Act of 1917, as amended, together with the limiting act of 1931. It was only on the basis of this specific repeal that the Immigration and Naturalization Service, in Interpretation No. 1 cited in the amicus brief (p. 17), concluded that Congress had removed in 1940 the bar to citizenship incurred during World War I by neutral aliens claiming exemption from military service. In 1945, Congress apparently confirmed this conclusion by amending (Act of October 29, 1945, 59 Stat. 551) the definition of the phrase "ineligible to citizenship" in Section 28 (c) of the Immigration Act of 1924 to eliminate the reference to neutral aliens who had claimed exemption from military service under the Selective Draft Act of 1917. It should be noted, however, that the lower courts have been divided as to whether even the 1940 repealer terminated the disqualification. *Petition of Otness,* 49 F. Supp. 220 (N. D. Cal.) holding the disqualification to be removed; *contra, In re Urmeneta,* 42 F. Supp. 138 (E. D. Wis.) and *In re Samowich,* 70 F. Supp. 273 (S. D. Wash.). The significant thing is that the Congress considered that the ineligibility for citizenship imposed by the Selective Draft Act survived the expiration of that statute and continued until specifically terminated by the Congress.

We can find no evidence of any contrary purpose in the history of the Selective Training and Service Act of 1940. Section 16 (b) of the 1940 Act originally declared that the Act was to become inoperative May 15, 1945. But there is not even the slightest evidence that by setting this time limitation Congress wished to expunge a disqualification which had previously been incurred. On the contrary, it seems evident that Congress looked to the future and that it sought to chart a terminal point beyond which the selective service machinery would no longer be needed. This expectation proved premature and, on May 9, 1945, the expiration date was moved back one year. 59 Stat. 166. Another short extension, Act of May 19, 1946, 60 Stat. 181, was followed by the last amendment on June 29, 1946, 60 Stat. 341, 342, Section 7, which set the expiration date at March 31, 1947.[4] It is on this last extension that respondent relies. But we believe that he has overlooked the purpose Congress sought to fulfill in prescribing and extending this expiration date. In our opinion, the language and design of the Selective Training and Service Act of 1940 furnish no support for an assumption that Congress wished to end the ineligibility for citizenship benefits which it had es-

[4] Although the statute was allowed to expire on that date, the absence of selective service legislation endured only for a brief period. The following year witnessed the enactment of a new Selective Service Act of 1948, containing many similar provisions.

tablished as a concomitant of exempting neutral aliens from military service.

An important element in arriving at an evaluation of the Congressional design is found in 1 U. S. C., Supp. III, 109 (formerly R. S. 13 and 1 U. S. C. 29), which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the temporary statute shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Emphasis supplied.]

In the light of this enactment, it is irrelevant to refer to a supposedly contrary common-law rule. For any such rule has been superseded since 1871 by this specific legislation, which must be regarded as a general saving clause to be read into all repealing statutes. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United*

*States,* 208 U. S. 452, 465. Even when the repealing statute itself has a specific saving clause, the provisions of 1 U. S. C. 109 cannot be disregarded. Both saving clauses must be read and applied together, and the general clause of Section 109 will yield to the later specific clause only in the event of inconsistency. *Ibid.* Here there is no inconsistency between 1 U. S. C. 109 and the provisions of Section 16 (b) of STSA, as amended. Since there is no specific legislative directive ending the ineligibility of neutral aliens who claimed exemption from military service, their disability survived repeal of the statute. See *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

We cannot agree with the contention in the amicus brief that the reservation in 1 U. S. C. 109 of "penalties, forfeitures, and liabilities" did not encompass the disability which had attached to respondent. On the contrary it seems to us that this clearly was the type of penalty, forfeiture, or liability that Congress wished to preserve. *United States* v. *Reisinger,* 128 U. S. 398, merely rejected an assertion that this language did not reach criminal penalties. Later cases have affirmed the converse—that this saving clause does operate to continue civil liabilities and disabilities not expressly terminated. *Hertz* v. *Woodman, supra; United States* v. *Carter, supra.*

Finally, on October 29, 1945, the Congress incorporated the disqualification for citizenship im-

posed by Section 3 (a) of the Selective Training and Service Act of 1940 into the definition of "ineligible to citizenship" in Section 28 (c) of the basic Immigration Act of 1924 (59 Stat. 551, 8 U. S. C. 224 (c)). This action was inconsistent with any assumption that Congress regarded the disqualification as merely temporary. To the contrary, by incorporating it into permanent law after the fighting was over and when the Selective Training and Service Act was about to expire, Congress was treating it as a continuing disqualification like the similar bar imposed by the 1917 Act. It was in this Congressional action in 1945 that the Court of Appeals for the Second Circuit found an intent to continue the disqualification for citizenship in Section 3 (a) beyond the repeal of the 1940 Act. *Benziaw* v. *Godwin*, 168 F. 2d 952, 945.

2. *The status of Denmark during World War II:* The respondent now asserts that Denmark was not a neutral country during World War II, and that his exemption from military service as a neutral Danish citizen must be regarded as a nullity leaving him eligible for American citizenship (Resp. br. pp. 46–58). In the first place, we believe that he should not now be allowed to disavow his claimed status as a neutral alien in which he enjoyed complete exemption from military service during World War II. Furthermore, the respondent never presented this contention to the Selective Service System or to the Im-

migration and Naturalization Service in connection with his application for suspension of deportation. In any event, we believe that the contention is frivolous.

As we pointed out in our main brief, the determination of neutrality is a political question to be resolved by the President or by the agency designated by him (Pet. br. p. 64). The respondent seeks to avoid the force of this principle by asserting that the Director of Selective Service in classifying Denmark as a neutral country was acting at odds with the President and the Department of State. The situation of Denmark during World War II was unusual, and the United States and its military allies treated Denmark differently for different purposes. The listing of neutral countries for Selective Service purposes in Local Board Memorandum No. 112 was prepared, and from time to time amended, only after consultation and agreement with the Department of State. Contrary to the respondent's suggestion, there was no clash of policies between "subordinate" agencies, but rather a single, flexible national policy under the direction of the President. Indeed, the complicated situation with respect to Denmark would seem to be a perfect example of the reasons why the courts leave the determination of such questions to the political agencies of the Government.

3. *The respondent's Selective Service classification.* It is undisputed that the respondent

claimed exemption from military service as a neutral alien on Form DSS 301, and that he obtained and enjoyed exemption from military service. However, the respondent reiterates that in fact he was classified as 1–A, i. e., available for military service, until September 21, 1945 (R. 4; resp. br. p. 4). However, the official files of the Selective Service System show that the respondent was placed in Class 4–C, i. e., neutral aliens claiming exemption as such, on March 27, 1942, and that he was so notified on April 8, 1942.

Respectfully submitted.

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OCTOBER 1950.

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# Supreme Court of the United States

OCTOBER TERM, 1950

No. 34

J. HOWARD MCGRATH, Attorney General of the United States, et al., *Petitioners*,

v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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May, 1950.

# INDEX


| | PAGE |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Supplemental statement | 3 |
| Argument | 4 |
| I. The procedural question | 5 |
| II. The substantive question | 10 |
| Conclusion | 12 |


## CITATIONS

Cases:


*Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2nd, 1948), cert. den. 335 U. S. 886 ..... 11, 12

*Cammarata* v. *Miller*, 79 F. Supp. 643 (D. C. N. Y., 1948) ..... 7

*Connor* v. *Miller*, 178 F. (2d) 755 (C. A. 2nd, 1949) 9

*Eisler* v. *Clark*, 77 F. Supp. 610 (D. C. D. C., 1948), cert. den. 338 U. S. 879 ..... 7

*Ex parte Asit Ranjan Ghosh*, 58 F. Supp. 851, 854 (D. C. Cal., 1944), appeal dismissed 148 F. (2d) 822 (C. A. 9th, 1945) ..... 10

*Ex parte Fillichertie*, 62 F. Supp. 744, 747-48 (D. C. N. Y., 1945) ..... 10

*Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81 (C. A. 3rd, 1939), aff'd 310 U. S. 469 ..... 12

*Perkins* v. *Elg*, 307 U. S. 325, 99 F. (2d) 408 (C. A. D. C.), D. C. Equity 63, 408 ..... 6, 7

*Petition of Ajlouny*, 77 F. Supp. 327 (D. C. Mich., 1948) ..... 11

*Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C. A. 3rd, 1950) ..... 7

*Stamatiou* v. *Miller*, 88 F. Supp. 556 (D. C. Pa., 1949) ..... 9

*Trinler* v. *Carusi*, 166 F. (2d) 457, 168 F. (2d) 1014 (C. A. 3rd, 1948) ..... 7

PAGE

Statutes:
Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 ..... 3, 5, 7
Declaratory Judgment Act, 28 U. S. C. 2201 ..... 3, 5, 6, 7
Immigration Act of 1917, Sec. 19(c), 54 Stat. 672, 8 U. S. C. A. 155(c) ..... 3
Immigration Act of 1917, Sec. 25, 39 Stat. 892, 8 U. S. C. A. 164 ..... 2
Selective Training and Service Act of 1940, Sec. 3(a) 54 Stat. 885, as amended, 50 U. S. C. 303 (App.) ..... 2, 4, 5, 10, 11
28 U. S. C. 1254(1) ..... 2

Miscellaneous:
Brief of Solicitor General in Opposition to Certiorari in *Kaminer* v. *Clark*, No. 346, October Term 1949 ..... 6
Federal Rules of Civil Procedure, Rule 57 ..... 7, 9
Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23 ..... 11
Motion of Solicitor General to Dismiss the Petition for a Writ of Certiorari and Memorandum in Support Thereof in *Benzian* v. *Godwin*, No. 317, October Term 1948 ..... 12
49 Col. L. Rev. 73, 80 (1949) ..... 7
61 Harv. L. Rev. 1445 (1948) ..... 7

# Supreme Court of the United States

OCTOBER TERM, 1949

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**No. 700**

---

J. HOWARD MCGRATH, Attorney General of the United States, et al., *Petitioners*,

v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals (R. 17-29) is now reported at 179 F. (2d) 796. The District Court wrote no opinion (R. 12).

### JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 29). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition

for a writ of certiorari was extended to and including March 27, 1950 (R. 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether, when the Attorney General refuses to suspend deportation solely because of erroneous construction of a statute, and habeas corpus is unavailable to the applicant for suspension because he is not in custody, he may, after exhausting all administrative remedies, obtain a correct construction of the statute in a declaratory judgment proceeding.*

2. Whether it was correctly decided that an alien admitted as a temporary visitor who at all relevant times was under a warrant of deportation was not "residing in the United States" and therefore was not liable to military service under Section 3(a) of the Selective Training and Service Act of 1940, as amended (hereinafter abbreviated STSA).

## STATUTES INVOLVED

In addition to the statutes summarized by petitioners (Pet. 2-5), attention is called to the Immigration Act of 1917, Sec. 25, 39 Stat. 893, 8 U. S. C. A. 164, which provides:

* Petitioners state the procedural question as two questions, one referring to the Administrative Procedure Act, the other to a declaratory judgment proceeding (Pet. 2). Neither of petitioners' statements is correct, for each assumes that respondent was free to bring habeas corpus—that his suit was "in lieu of a proceeding in habeas corpus" (Pet. 2). Actually, respondent was not in custody and habeas corpus was not available (R. 6, 18), as is clear from the opinion below (R. 18, 22).

> The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this chapter.

In connection with Section 19(c) of the Immigration Act of 1917, 54 Stat. 672, 8 U. S. C. A. 155(c), summarized by petitioners (Pet. 3), it should be noted that the Attorney General has authority to suspend deportation of an alien who proves good moral character for the preceding five years and who is not ineligible to naturalization if the Attorney General finds "that such deportation would result in serious economic detriment to a citizen * * * who is the spouse, parent, or minor child of such deportable alien".

## SUPPLEMENTAL STATEMENT

Certain omissions and inaccuracies in petitioners' Statement (Pet. 5-9) necessitate this Supplemental Statement.

Respondent's complaint was brought under the Immigration Act as well as under the Declaratory Judgment Act and Administrative Procedure Act (R. 2).

Petitioners' statement that respondent "has continued to reside in the United States" since he was ordered deported to Denmark on May 15, 1941 (Pet. 6), assumes, contrary to the fact and to the decision of the court below, the very substantive issue involved in this case. The correct statement in this regard is that respondent since his entry into the United States continuously has remained therein (R. 3).

Respondent's acceptance of employment in the United States while a temporary visitor was necessitated by the fact that the outbreak of World War II prevented his departure from this country and consequently he had to earn a living here (R. 3). Respondent's wife, a native-born citizen of the United States, is wholly dependent upon respondent for support (R. 4). The Board of Immigra-

tion Appeals for the Attorney General has concluded all issues in respondent's favor, including the facts that he has been a person of good moral character for the past five years and that his deportation would cause an economic detriment to his United States citizen wife, except that it has not found that respondent is eligible to naturalization in the United States (R. 4-5). Deportation of respondent would be suspended if the Board were of the opinion that he is eligible to naturalization in the United States (R. 5). Refusal to suspend deportation is predicated exclusively upon the conclusion that respondent is not eligible to naturalization in the United States, which conclusion in turn is predicated exclusively on the Board's construction of STSA, Sec. 3(a) (R. 5).

The warrant of deportation issued against respondent on May 15, 1941 was withdrawn on June 10, 1946 (R. 4). Respondent was not in custody at the time he brought suit on December 6, 1947 nor is he today (R. 2, 6, 18). Respondent has not been under a warrant of deportation since June 10, 1946, but is under an order of petitioners to "depart voluntarily" from the United States in lieu of deportation (R. 4, 22).

The most concise yet accurate statement of the facts appears in the opinion of the court below (R. 17-18).

## ARGUMENT

The decision below is clearly correct on both the procedural and substantive questions. There is no conflict between courts of appeals on either question. As to the procedural question, the decision below accords with all of the circuit courts of appeals cases in point, and a controlling decision of this Court. The decision on the substantive question is dependent on unique facts and is not of general importance. Neither question merits further review.

## I. The Procedural Question

1. Petitioners in Questions Presented (Pet. 2) and in Reasons for Granting the Writ (Pet. commencing at 9), erroneously assume that the procedural question is whether a deportation order can be reviewed in a proceeding under the Declaratory Judgment Act or Administrative Procedure Act, in lieu of a proceeding in habeas corpus. That is not the precise question. Respondent is not under a deportation order and has not been since the order was withdrawn on June 10, 1946 (R. 4).

Respondent duly applied for suspension of deportation (R. 4). The Board, acting for the Attorney General, denied the application solely on the basis of its construction of STSA, Sec. 3(a) (R. 5). The consequence of such denial was that respondent was ordered to effect his "voluntary departure" from the United States (R. 4). After exhausting all administrative remedies (R. 6, 18), respondent brought his declaratory judgment action to obtain what he contends is a correct construction of the statute (R. 2, 7). As stated by the court below, respondent "was not in custody at the time he brought suit, nor is he today" (R. 6, 18). He is not under a warrant of deportation and has not been since June 10, 1946 (R. 4). Therefore habeas corpus was not and is not available.

Habeas corpus would be available only if respondent violated petitioners' order to him to effect his departure and subsequently was subjected to a deportation warrant after being taken into custody.

The procedural question therefore is whether an applicant for suspension of deportation whose application is denied and who is required to depart solely because of an erroneous administrative construction of a statute, may obtain in a declaratory judgment action a correct construction, habeas corpus being unavailable. It is submitted that the answer of the court below is clearly correct. As stated by that court, "To compel him (respondent) to go

into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country." (R. 22). This conclusion already has had the approval without dissent of this Court which upheld the granting of declaratory relief in *Perkins* v. *Elg*, 307 U. S. 325, where the trial court said:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States and in case of her not going, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (*Perkins* v. *Elg*, D. C. Equity 63, 408, italics added.)

The substantiality of the distinction between the instant procedural question, and the question assumed by petitioners to be presented, has been recognized at this term by the Solicitor General in his brief opposing certiorari in *Kaminer* v. *Clark*, No. 346:

> "Since petitioner is now confined in the Southern District of New York, it is plain that the United States District Court for the District of Columbia derives no power from the Declaratory Judgment Act, which is procedural only, to effect his release indirectly by a declaration of rights. In other words, if that court has no power to inquire into the alleged restraint of petitioner's liberty, it has no power to effect his release under any form of procedure. * * * *Perkins* v. *Elg*, 99 F. 2d 408 (C. A. D. C.), modified, 307 U. S. 325, and *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3), on which petitioner relies (Pet. 7-8, 9-10, 13), are plainly distinguishable from the case at bar. *In those cases, the complainants were not in custody* (see 99 F. 2d at pages 413-414 and 166 F. 2d at page 459), and neither of the courts in those cases was called upon to make an inquiry into the

cause of a restraint of liberty. (Pp. 8-9, italics added).

2. In any event, it is now clear that habeas corpus is no longer the exclusive judicial remedy for correction of errors of statutory construction made in deportation proceedings. The cases cited by petitioners which were decided before enactment of the Declaratory Judgment Act and the Administrative Procedure Act (Pet. 11-12) no longer control. Necessity for further discussion of this point is obviated by the exhaustive and authoritative nature of the opinion below, and in the interest of brevity that opinion is referred to as dispositive of this issue (R. 18-23).

In addition it should be noted that Rule 57, Federal Rules of Civil Procedure, not mentioned in the Petition, provides in part:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

3. The cases decided by circuit courts of appeals unanimously hold that a person is entitled to a declaratory judgment under the Administrative Procedure Act in circumstances such as exist here. Besides the case at bar, these cases are *Trinler* v. *Carusi*, 166 F. (2d) 457, 168 F. (2d) 1014 (C. A. 3rd, 1948), and *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C. A. 3rd, 1950). The unanimity of the courts of appeals substantially has its counterpart in the thinking of other courts and the profession generally, *Eisler* v. *Clark*, 77 F. Supp. 610 (D. C. D. C., 1948), cert. den. 338, U. S. 879; *Cammarata* v. *Miller*, 79 F. Supp. 643 (D. C. N. Y., 1948); 61 Harv. L. Rev. 1445 (1948); 49 Col. L. Rev. 73, 80-81 (1949). Indeed as suggested by the court below (R. 18-19), the right to a declaratory judgment in deportation proceedings under the instant circumstances exists independently of the Administrative Procedure Act. *Perkins* v. *Elg*, 307 U. S. 325. The decision of the court below is thus accordant with all of the

circuit courts of appeals cases in point, the thinking of the profession, and the controlling decision of this Court.

4. Awarding declaratory relief here in no way involves improper interference with administrative discretion. The substantive question is a naked, isolated question of law—has the Attorney General misconstrued a statute? The correct answer to that question is indispensable to lawful exercise of discretion.

Petitioners' intimations that the administrative process is not complete (Pet. 24), are afterthought. No such contention has been made heretofore. The complaint alleges exhaustion of administrative remedies (R. 6). Indeed, respondent went beyond the requirement of such exhaustion for, after final action of the Board, he duly petitioned the Attorney General for review (R. 4). As stated by the court below (R. 22):

> "That this is a case ripe for judicial cognizance is not seriously challenged by the appellees (petitioners)."

5. Petitioners' argument that the decision below might unduly burden District of Columbia courts (Pet. 21-22), puts the cart before the horse and is logically irrelevant, for if such courts have jurisdiction, they must perform their duty when jurisdiction is properly invoked, however burdensome the duty. But the argument is as unrealistic as it is irrelevant. A very small percentage of the deportation proceedings conducted by petitioners (Pet. 21) reach the courts in any form.

Petitioners' observation that declaratory proceedings can be abused (Pet. 22) is also true of habeas corpus. If it is conceivable that a habeas corpus proceeding might follow a declaratory proceeding, thus duplicating litigation (Pet. 22), it is a fact of history that habeas corpus proceedings have the habit of reappearing. The point is that the district courts can protect themselves against all frivolous and dilatory proceedings, in whatever form. And

under Rule 57, Federal Rules of Civil Procedure, declaratory proceedings may be expedited, no less than habeas corpus.

But whatever burden entertainment of declaratory proceedings might impose on the courts if available as an alternative to habeas corpus to review final deportation orders, that problem is irrelevant here because a deportation order is not involved. Likely petitioners' speculative fears arise in part at least from their confusion of the procedural problem actually involved here—judicial review for one not in custody and for whom habeas corpus is not available—with the more inclusive problem erroneously posed in petitioners' Questions Presented (Pet. 2). The precise procedural problem here presented arises under unique facts not likely to recur often. In any event the problem will recur only with a person of excellent moral character, like respondent, in respect to whom every dictate of efficient administration, common sense and humanity requires exemption from custody pending determination of a purely legal question.

Lastly, if petitioners' speculative fears materialize and declaratory suits in deportation cases prove unduly burdensome to District of Columbia courts, a relatively simple legislative change would enable such suits to be brought in other districts against the local official of the Immigration and Naturalization Service. In fact, it has been technical objections by petitioners, which could have been waived in the form of consents to venue or voluntary appearances, which have caused deportation cases to be litigated here rather than elsewhere. See *Stamatiou* v. *Miller*, 88 F. Supp. 556 (D. C. Pa., 1949); *Connor* v. *Miller*, 178 F. (2d) 755 (C. A. 2nd, 1949).

The procedural question was correctly decided by the court below consistently with all of the decided courts of appeals cases and the controlling decision of this Court, and merits no further review.

## II. The Substantive Question

The decision below is also clearly right on the substantive question, is dependent on the unique instant facts and is not of general importance, and therefore merits no further review.

Respondent came to the United States in August, 1939, as a temporary visitor. Unable because of war conditions to return to Denmark, he had to accept employment in this country or starve. His acceptance of employment, a violation of his temporary visitor's status, resulted in the issuance of a warrant of deportation against him on May 15, 1941. From that time on, until the warrant was withdrawn on June 10, 1946, he was subject continuously to that warrant, the execution of which was in abeyance only because such execution was rendered physically impossible by war conditions (R. 3-4). Thus, during the entire period when in the theory of petitioners respondent was subject to STSA, Sec. 3(a), respondent did not have in this country even the status of a temporary visitor or sojourner; his presence here was with the express disapproval of the sovereign; he was actually under a warrant of deportation.

Under these circumstances it is clear that respondent was not "residing in the United States" and was not subject to STSA, Sec. 3(a). Abundant precedents of international law, our own immigration and naturalization laws, and judicial decisions defining "residing" in the varying and multiple situations in which it has legal significance (R. 23-29), as well as decisions defining it specifically for purposes of World War II military service—e.g., *Ex parte Asit Ranjaw Ghosh*, 58 F. Supp. 851, 854 (D. C. Cal., 1944), appeal dismissed, 148 F. (2d) 822 (C. A. 9th, 1945); *Ex parte Fillibertie*, 62 F. Supp. 744, 747-48 (D. C. N. Y., 1945)—make this conclusion inevitable. To stretch "residing in the United States" to include one like respondent whose temporary visit had culminated in

a warrant of deportation and who remained subject to such warrant at all relevant times, would be to abandon both reason and history. This is demonstrated so comprehensively and authoritatively in the opinion of the court below (R. 23-29) that further discussion is unnecessary and in the interest of brevity reference is made to such opinion.**

Petitioners, although conceding "some factual deviations" between this case and *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2nd, 1948), cert. denied 335 U. S. 886, argue that the decision below is irreconcilably opposed to that of the Court of Appeals for the Second Circuit in the *Benzian* case (Pet. 26). But the "factual deviations" wholly differentiate the cases. Benzian was not under a warrant of deportation (R. 26) as was respondent (R. 4). Moreover, Benzian, a citizen of Sweden (168 F. (2d) at 953) was clearly a "citizen or subject of a neutral country" within the meaning of STSA, Sec. 3(a), whereas respondent, a Danish subject (R. 3), was not.**

And, in any event, the *Benzian* case had abated prior to its decision by the court of appeals because the Selective Service Board, as members of which defendants were sued, had passed out of existence. It was on this basis that the Solicitor General moved to dismiss the petition for

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** An alternative basis for the conclusion that respondent was never subject to STSA, Sec. 3(a), which the court below mentioned but did not consider necessary to pass upon (R. 23-24, n. 6), is that respondent, a Danish subject (R. 3) was not the subject of a neutral nation within the meaning of STSA, Sec. 3(a). *Petition of Ajlouny*, 77 F. Supp. 327 (D. C. Mich., 1948). Judicial notice will be taken that Denmark was invaded by Germany on April 9, 1940, months before the enactment of STSA on September 16, 1940. This Government appears to have recognized the belligerency of Denmark from April 9, 1940. Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23, enacted November 15, 1944, includes Denmark in the list of " * * * nations which are signatories of the United Nations Declaration dated January 1, 1942 and nations associated with them in this war * * *".

certiorari in the *Benzian* case.*** An abated cause can present no conflict, for it is not a binding precedent. *Leader* v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81 (C. A. 3rd, 1939), affirmed, 310 U. S. 469.

## CONCLUSION

The judgment below is clearly correct both on the procedural and the substantive questions and there is no conflict of decisions of circuit courts of appeals. To the extent that the case, in its procedural aspect, is of general importance, it is controlled by a decision of this Court and is in harmony with all courts of appeals cases in point. The opinion below is unanimous, exhaustive and authoritative. No question is presented which merits further review by this Court. It is, therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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May, 1950.

*** *Benzian* v. *Godwin*, No. 317, October Term, 1948, Motion of Solicitor General to Dismiss the Petition for a Writ of Certiorari and Memorandum in Support Thereof.

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# Supreme Court of the United States

October Term, 1950

No. 34

J. HOWARD MCGRATH, Attorney General of the United States, ET AL., *Petitioners*

v.

PEDER KRISTIAN KRISTENSEN, also known as PETER KRISTEN KRISTIANSEN, also known as PETER CHRISTENSEN

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE RESPONDENT

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# INDEX


| | PAGE |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Supplemental statement | 3 |
| Summary of argument | 4 |
| Argument | 7 |
| Preliminary considerations | 7 |
| I. Judicial review of the Attorney General's erroneous interpretation of a statute may be had in a declaratory judgment action after exhaustion of administrative remedies, where such interpretation alone prevents suspension of deportation | 13 |
| A. Preliminary analysis | 13 |
| B. Section 19(a) of the Immigration Act of 1917 does not preclude judicial review within the meaning of Section 10 of the A. P. A. | 15 |
| (1) The provision of Section 19(a) that the Attorney General's decision shall be final does not preclude review of the type here invoked | 15 |
| (2) Habeas corpus is judicial review within the meaning of Section 10 of the A. P. A. | 17 |
| (3) Assuming, *arguendo*, that habeas corpus is not judicial review, nevertheless judicial review in deportation cases has existed since 1934 | 18 |
| C. The plain meaning of Section 10(b) of the Administrative Procedure Act makes the declaratory judgment action a proper form of review under the instant facts | 20 |

PAGE

D. The legislative history of the A. P. A. exhibits Congress' intention to approve and extend the use of the declaratory judgment procedure such as this Court approved in the case of *Perkins* v. *Elg* .... 21

E. Judicial review by declaratory judgment is appropriate, convenient and reasonable in the instant situation ..... 25

---

Preliminary statement for Questions II and III .... 31

II. Respondent was not "residing in the United States"; therefore he was not liable for military service, and the filing of Form DSS 301 was a nullity ..... 32

A. Preliminary statement ..... 32

B. Respondent was not "residing in the United States", and STSA Section 3(a) is inapplicable to him ..... 33

1. "Residence" in international law ..... 35
2. "Residence" in laws regulating temporary visitors ..... 35
3. "Residence" in general naturalization laws ..... 37
4. "Residence" in special naturalization laws ..... 37
5. "Residence" in decisions under various other laws ..... 38

C. Nothing in the legislative history of Section 3(a)'s amendment suggests that Congress intended to abandon the established meaning of "residing in the United States" ..... 39

III. Denmark, of which respondent was "citizen or subject" was not a "neutral country", and therefore the filing of the claim for exemption was a nullity ..... 46

Conclusion ..... 62

PAGE

## CITATIONS

Cases:

*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-241 (1937) ..... 11, 12
*Ajlouny, Petition of*, 77 F. Supp. 327, 329-330 (E. D. Mich., 1948) ..... 47
*Arenas v. United States*, 322 U. S. 419, 432 (1944) ..... 10, 31
*Azzolini v. Watkins*, 172 F. 2d 897, 898 (1949) ..... 14
*Bakelite Corp., Ex parte*, 279 U. S. 438, 452, 458-460 (1929) ..... 12
*Bata Shoe Co., Inc. v. Perkins*, 33 F. Supp. 508, 509 (D. D. C., 1940) ..... 19
*Benzian v. Godwin*, 168 F. 2d 952, 956, (n. 10) (C. A. 2d, 1948), cert. denied 335 U. S. 886 ..... 43, 44, 58
*Blankford, Matter of*, 241 N. Y. 480, 149 N. E. 415 (1925) ..... 38
*Brassert v. Biddle*, 59 F. Supp. 457, 462-463 (D. Conn., 1944), affirmed 148 F. 2d 134 ..... 28
*Bridges v. Wixon*, 326 U. S. 135, 156 (1945) ..... 16, 26
*Cleveland v. United States*, 329 U. S. 14, 22-24 (1946) ..... 44
*Connell v. Vermilya-Brown Co.*, 164 F. 2d 924, 927-928 (C. A. 2d, 1947), affirmed 335 U. S. 377, 380 ..... 55
*Connor v. Miller*, 178 F. 2d 755 (1949) ..... 14
*Cooper, Ex parte*, 143 U. S. 472, 503 (1892) ..... 55
*Curtiss-Wright Corp. v. United States*, 299 U. S. 304, 319 (1936) ..... 57
*Darabi v. Northrup*, 54 F. 2d 70 (C. A. 6th, 1931) 18
*Estep v. United States*, 327 U. S. 114 (1946) ..... 16
*Ewell v. Daggs*, 108 U. S. 143, 150 (1883) ..... 58
*Fafalios v. Doak*, 60 App. D. C. 215, 50 F. 2d 640 (1931) ..... 18
*Fillibertie, Ex parte*, 62 F. Supp. 744, 747-748 (E. D. S. C., 1945) ..... 38
*Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785 (C. A. 2d, 1946), affirmed 328 U. S. 275, 290 (1946) ..... 45, 57
*Florica Constantinescu v. Commissioner*, 11 Tax Ct. 36 (1948) ..... 38

PAGE

*Gegiow v. Uhl*, 239 U. S. 3, 9 (1915) ..... 15, 16
*Ghosh, Ex parte*, 58 F. Supp. 851, 853-855 (S. D. Cal., 1944), appeal dismissed 148 F. 2d 822 (C. A. 9th, 1945) ..... 46
*Girouard v. United States*, 328 U. S. 61, 69-70 (1946) ..... 44
*Gordon v. United States*, 117 U. S. 697 (1864) .... 9, 10
*Gordon v. United States*, 2 Wall. 561-562 (U. S. 1865) ..... 10, 11
*Great Northern Ry. Co. v. United States*, 208 U. S. 452, 465 (1908) ..... 59
*Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927) ..... 38
*Hayburn's* case, 2 Dall. 409 (1792) ..... 9
*Hecht Co. v. Bowles*, 321 U. S. 321 (1944) ..... 59
*Helvering v. Bliss*, 293 U. S. 144, 151 (1934) ..... 44
*Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939) ..... 44
*Imperiale v. Perkins*, 62 App. D. C. 279, 66 F. 2d 805 (1933) ..... 18
*International Mercantile Marine Co. v. Elting*, 67 F. 2d 886, 887 (C. A. 2d, 1933) ..... 36, 37
*Kabadian v. Doak*, 62 App. D. C. 114, 65 F. 2d 202 (1933) ..... 18
*Kaminer v. Clark*, 85 U. S. App. D. C. 205, 177 F. 2d 51 (1949) ..... 29
*Kaplan v. Tod*, 267 U. S. 228, 230 (1925) ..... 37
*Keiler v. Potomac Electric Power Co.*, 261 U. S. 428, 442-443 (1923) ..... 12
*Kohl, Petition of*, 146 F. 2d 347 (C. A. 2d, 1945) 60
*Kwock Jan Fat v. White*, 253 U. S. 454 (1920) .... 15
*Lang v. Commissioner*, 304 U. S. 264, 270 (1938) .. 44
*Leader v. Apex Hosiery Co.*, 108 F. 2d 71, 81 (C. A. 3rd, 1939), affirmed 310 U. S. 469 ..... 43
*Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 334 (1932) ..... 16
*Mahler v. Eby*, 264 U. S. 32 (1924) ..... 15
*McGrath v. Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649 (1949) ..... 39
*Neuberger v. United States*, 13 F. 2d 541, 542 (C. A. 2d, 1926) ..... 38
*O'Donoghue v. United States*, 289 U. S. 516, 535-536, 546 (1933) ..... 12

PAGE

*Oganesoff, Petition of*, 20 F. 2d 978, 980 (S. D. Cal., 1927) ..... 37
*Perkins v. Elg*, 307 U. S. 325, 349, 349-350 (1939) ..... 5, 10, 16, 18, 24, 31
*Pezzi, In re*, 29 F. 2d 999 (S. D. Cal., 1928) ..... 37
*Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447, 497 (1932), mandamus and prohibition denied 285 U. S. 526 ..... 11
*Podovinnikoff v. Miller*, 179 F. 2d 937 (C. A. 3rd, 1950) ..... 14
*Price v. Johnston*, 334 U. S. 266, 287-290 (1948) ..... 28
*Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423-424 (1946) ..... 11
*Republic of Mexico v. Hoffman*, 324 U. S. 30, 34-35, (1945) ..... 55
*Rita Maersk, The*, 52 F. Supp. 56 (D. Mass. 1943), affirmed 144 F. 2d 921 ..... 49
*Salinger v. Loisel*, 265 U. S. 224, 230 (1924) ..... 28
*Schacht v. Young*, 164 F. 2d 882, 883 (C. A. 5th, 1947) ..... 36
*Stadtmuller v. Miller*, 11 F. 2d 732 (C. A. 2d, 1926) ..... 35
*Standard Oil Company v. United States*, 221 U. S. 1 (1911) ..... 59
*Sundell v. Lotmar Corp.*, 44 F. Supp. 816 (S. D. N. Y., 1942) ..... 54
*Three Friends, The*, 166 U. S. 1, 63, 70-71 (1897) .. 55, 56
*Tutun v. United States*, 12 F. 2d 763 (C. A. 1st, 1926) ..... 61
*Tutun v. United States*, 270 U. S. 568, 578 (1926) ..... 55
*United States v. American Tobacco Company*, 221 U. S. 106 (1911) ..... 59
*United States v. American Trucking Assns.*, 310 U. S. 534, 549-550 (1940) ..... 44, 57
*United States v. Ferreira*, 13 How. 40 (1851) ..... 9
*United States v. Insurance Co. of North America*, 143 F. 2d, 53, 54 (C. A. 4th, 1944) ..... 49
*United States v. Jones*, 119 U. S. 477, 497 (1886) .. 10, 11
*United States v. Kreticos*, 59 App. D. C. 305, 40 F. 2d 1020 (1930) ..... 37
*United States v. Parisi*, 24 F. Supp. 414, 417-418, 419 (D. Md., 1938) ..... 36, 37
*United States v. Tynen*, 11 Wall. 88, 95 (U. S. 1871) ..... 58

PAGE

*United States ex rel. Cammarata v. Miller*, 79 F. Supp. 643 (S. D. N. Y., 1948) ..... 14
*United States ex rel. Di Mieri v. Uhl*, 96 F. 2d 92, 93 (C. A. 2d, 1938) ..... 36
*United States ex rel. Trinler v. Carusi*, 166 F. 2d 457 (C. A. 3rd, 1948) ..... 13
*Wieg, In re*, 30 F. 2d 418 (S. D. Tex., 1929) ..... 37
*Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289 (1928) ..... 11
*Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-47, 47 (1950) ..... 19, 29
*Wright, Petition of*, 42 F. Supp. 306, 307 (E. D. Mich., 1941) ..... 37

Constitution and Statutes:

Constitution and the United States:
Art. I, Sec. 9 ..... 11
Art. III ..... 12
Administrative Procedure Act, 60 Stat. 242, 243, 5 U. S. C. A. §§1001, ff.:
Sec. 9 ..... 3
Sec. 9(a) ..... 3, 14
Sec. 10 ..... 3, 14, 15, 17, 18, 19, 20, 24
Sec. 10(b) ..... 4, 5, 12, 17, 18, 20, 21, 25
Sec. 10(c) ..... 12
Alien Ownership of Land Act, 29 Stat. 618, 8 U. S. C. A. §72 ..... 33
Alien Registration Act, 54 Stat. 673, 8 U. S. C. A. §452 ..... 34
Civil War Draft Act, March 3, 1863, 12 Stat. 731 33
Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. A. §§2201-2202 ..... 4, 15, 20, 24
Displaced Persons Act, 62 Stat. 1009, 50 U. S. C. A. App. §1951, ff. ..... 34
Emergency Price Control Act of 1942, Sec. 205(a), 56 Stat. 33, 58 Stat. 340, 50 U. S. C. A. App. §925 ..... 60
Immigration Act of 1917, 39 Stat. 893:
Sec. 19(a), 8 U. S. C. A. §155(a) ..... 14, 15, 16
Sec. 19(c), 8 U. S. C. A. §155(c) ..... 3, 8, 9
Sec. 25, 8 U. S. C. A. §164 ..... 3, 4

PAGE

Immigration Act of 1924, as amended, 59 Stat. 551, Sec. 28(c), 8 U. S. C. A. §224(c) ..... 58, 59
Nationality Code, 54 Stat. 1142, as amended, 8 U. S. C. A.
§707 ..... 33, 37
§707(a) ..... 60
Selective Draft Act of 1917, as amended, Secs. 2 and 5, 40 Stat. 78, 80, 955 ..... 33
Selective Training and Service Act of 1940, as amended, 54 Stat. 885, 897, 55 Stat. 845, 59 Stat. 166, 60 Stat. 181, 342:
Sec. 2, 50 U. S. C. A. App. §302 ..... 40, 43, 45
Sec. 2(a), 50 U. S. C. A. App. §302(a) ..... 40
Sec. 3(a), 50 U. S. C. A. App. §303(a) ..... 2, 6, 7, 13, 14, 30, 31, 32, 33, 40, 43, 45, 47, 58, 59, 60, 61
Sec. 5(a) ..... 45
Sec. 16(b) 50 U. S. C. A. App. §316(b) .. 58, 59
Spanish-American War Draft Act, April 22, 1898, 30 Stat. 361 ..... 33
World War II Military Service Act, 56 Stat. 182, 58 Stat. 886, 887, 59 Stat. 658, 8 U. S. C. A. §1001-1002 ..... 37
1 U. S. C. A. §109 (R. S. §13, 16 Stat. 432, 58 Stat. 118, 61 Stat. 633, 635) ..... 59
8 U. S. C. A. §203, 43 Stat. 154 ..... 35
§203(2) ..... 37
28 U. S. C. A. §451 ..... 12
28 U. S. C. A. §1254(1) ..... 2

Miscellaneous:

Annual Reports of the Director of the Administrative Office of the United States Courts, Table C(2) ..... 27
Borchard, *Declaratory Judgments* (1934) ..... 22
8 CFR (1949):
119.1-14 ..... 36
119.2(c) ..... 36
176.101 ..... 35
176.106 ..... 36
176.106-109 ..... 35
176.201 ..... 36
176.201-203 ..... 36

PAGE

32 CFR:
(1st Ed. Cum. Supp.) §611.21, p. 9122 ..... 45, 46
(1945 Supp.) §611.21-1, p. 3172 ..... 46
87 Cong. Rec.:
P. 9905 ..... 41
P. 10055 ..... 42
Exec. Order No. 2398, April 25, 1940, 5 Fed. Reg. 1569 ..... 50
Exec. Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400 ..... 49, 50
Federal Administrative Procedure Act and the Federal Administrative Agencies, Vol. VII of N. Y. U. School of Law Institute Proceedings ..... 16
Federal Rules of Civil Procedure, Rule 57 .... 5, 18, 26
*Final Report*, Attorney General's Committee, p. 81 ..... 22, 24
III Hackworth, Dig. of Int. Law, 600 ..... 35
H. Doc. No. 986, 76th Cong., 3d Sess., p. 6 ..... 22, 23
H. Rep. No. 1554, 77th Cong., 1st Sess. ..... 42
H. Rep. No. 1980, 79th Cong., 2d Sess. ..... 20
H. R. 6215, 77th Cong., 1st Sess. ..... 41
H. R. 1203, 79th Cong., 1st Sess. ..... 21
Imm. & Nat. Service, Comm'r, File No. A6897992, October 10, 1949 ..... 34
Letter from Secretary of State Seward to Mr. White, July 10, 1868, 79 MS. Dom. Let. 73 .... 35
Letter from Secretary of State Fish to Mr. Wing, April 6, 1871, MS. Inst. Ecuador, I. 263 ..... 35
Logan-Walter Bill ..... 22, 25
Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23, enacted November 15, 1944 ..... 48, 57
IV Moore, Int. Law Dig., 57, 58 ..... 35
New York Times, Late City Edition ..... 49-53, *passim*
Notes of the Advisory Committee on Rules for Civil Procedure ..... 19, 21
39 Ops. Att'y Gen. 504 ..... 40
Sel. Ser. Dir. Local Board Memo. No. 112 ..... 48, 56
S. 2126, 77th Cong., 1st Sess. ..... 41
S. 7, 79th Cong., 1st Sess., p. 160 ..... 21, 22
S. 3455, §106, 81st Cong., 2d Sess. ..... 19

PAGE

Sen. Doc. 248, 79th Cong., 2d Sess.:
P. 1 ..... 21
P. 11 ..... 21
P. 36 ..... 14
P. 37 ..... 22
Pp. 37-38 ..... 15
P. 155 ..... 21
P. 212 ..... 21
P. 213 ..... 21
P. 224 ..... 24
Pp. 241-250 ..... 20
P. 275 ..... 14
P. 276 ..... 21
Pp. 310-311 ..... 14
Pp. 368-369 ..... 14
P. 369 ..... 24
P. 407 ..... 24
Sen. Rep. No. 915, 77th Cong., 1st Sess. ..... 41
Sen. Rep. No. 752, 79th Cong., 1st Sess. ..... 20
Treaty between United States and Germany, December 8, 1923, 44 Stat. (Part 3) 2136, Art. VI 35

# Supreme Court of the United States

**October Term, 1950**

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No. 34

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J. Howard McGrath,[1] Attorney General of the United States, et al., *Petitioners*

v.

Peder Kristian Kristensen, also known as Peter Kristen Kristiansen, also known as Peter Christensen

---

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The opinion of the Court of Appeals (R. 13)[2] is reported at 179 F. 2d 796. The District Court wrote no opinion (see R. 9).

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[1] When this action was commenced, the Honorable Tom Clark, Attorney General of the United States, and Laurence P. Sherfy, one of the five members of the Board of Immigration Appeals, were among the seven defendants named (R. 1). By appropriate orders of the Court of Appeals, September 28, 1949 (R. 12-13), and the District Court, October 22, 1948, their successors, the Honorable J. Howard McGrath, Attorney General of the United States, and Louisa Wilson, member of the Board of Immigration Appeals, were substituted as defendants.

[2] All references to the Transcript of Record are to the record as printed in this Court, i. e., to the upper numerals on pages containing double pagination.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1949 (R. 25). By order of the Chief Justice, dated March 17, 1950, the time for filing a petition for certiorari was extended to and including March 27, 1950 (R. 28). Petition for a writ of certiorari was filed March 24, 1950, and was granted May 15, 1950 (R. 29). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## QUESTIONS PRESENTED

1. Whether, when the Attorney General refuses to suspend deportation solely because of his erroneous interpretation of a statute, and habeas corpus is unavailable to the applicant for suspension because he is not in custody, he may, after exhausting all administrative remedies, obtain a correct interpretation of the statute in a declaratory judgment proceeding.

2. Whether it was correctly decided that an alien admitted as a temporary visitor who at all relevant times was under a warrant of deportation was not "residing in the United States" and therefore was not liable to military service under Section 3(a) of the Selective Training and Service Act of 1940, as amended (hereinafter abbreviated STSA).

3. Whether Denmark was a non-neutral country during the times involved, so that the application of a Danish subject for relief from United States military service did not bar him from United States citizenship under STSA, Section 3(a).[3]

---

[3] For the first time, as they admit (Pet. Br. 13), petitioners raise the question whether the case at bar is a justiciable "case or controversy". They state the question thus: "Whether the Attorney General's refusal to suspend deportation of an alien under

## STATUTES INVOLVED

In addition to the statutes summarized by petitioners (Pet. Br. 2-6), attention is called to the Immigration Act of 1917, Sec. 25, 39 Stat. 893, 8 U. S. C. A. §164, which provides:

> "The district courts of the United States are invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this chapter."

In connection with the Administrative Procedure Act (hereinafter referred to as the A. P. A.), 60 Stat. 242, 243, 5 U. S. C. A. §1001, ff., from which petitioners have quoted only a portion of Section 10 (Pet. Br. 4-5), it should be noted that Section 9 of the A. P. A. provides:

> "In the exercise of any power or authority—
> (a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

## SUPPLEMENTAL STATEMENT

The following facts are omitted from petitioners' Statement. (Pet. Br. 6-10):

---

Section 19(c) of the Immigration Act of 1917 presents a justiciable question, where his suspension of deportation must be affirmatively approved by a concurrent resolution of the Congress." (Pet. Br. 2). By so phrasing the question, they imply that the Attorney General's action is still completely *in fieri* unless and until it is approved by the Congress. The fact is that the Attorney General has power, wholly apart from any further action of Congress, to suspend deportation until the end of the succeeding session of Congress. It is to obtain the exercise of his discretion on a legal basis that respondent has prosecuted this action. Petitioners' new "question" is wholly insubstantial, as is established by petitioners' own argument, and in the interest of brevity, respondent will consider it briefly in the Argument before dealing with the questions presented to the court below and here separately stated.

Respondent's complaint was brought under the Immigration Act of 1917 as well as under the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. A. Sections 2201-2202, and the A. P. A. (R. 1-2).

Respondent's acceptance of employment in the United States while a temporary visitor was necessitated by the fact that the outbreak of World War II prevented his departure from this country and consequently he had to earn a living here (R. 2). Respondent's wife, a native-born citizen of the United States, is wholly dependent upon respondent for support (R. 3).

In connection with petitioners' statement that respondent's "request for exemption was honored, and he never was called upon to perform military service for the United States" (Pet. Br. 8), it should be noted that respondent's Selective Service Board sent him, without his request, Form DSS 301 (R. 4), and that after respondent executed and filed such form under the circumstances detailed by petitioners (Pet. Br. 7-8), his Selective Service Board informed him that he had been placed in Classification 1-A and ordered him to report for induction. Respondent did so, but was thereupon advised by the authorities in charge that he was released and should go home because he had filed Form DSS 301. Respondent remained in Classification 1-A from about April 30, 1942, until September 21, 1945 (R. 4).

## SUMMARY OF ARGUMENT

Respondent first disposes of petitioners' new contention that the case is not justiciable, as insubstantial. He then argues the questions presented to the court below:

### I

The Immigration Act's provision that the decision of the Attorney General "shall be final" in deportation mat-

ters, while rigidly limiting the scope of judicial review to questions of law, does not wholly preclude judicial review. The historic availability of habeas corpus in deportation cases proves this. Moreover, since the enactment in 1934 of the Declaratory Judgment Act, questions of law arising in deportation cases may be reviewed in declaratory judgment actions after exhaustion of administrative remedies. *Perkins v. Elg*, 307 U. S. 325 (1939). The effect of the A. P. A. is expressly to approve application of the doctrine of *Perkins v. Elg* in cases such as this. Section 10(b) of the A. P. A. provides that one "form of proceeding for judicial review" shall be "actions for declaratory judgments". Nothing in the introductory clause of Section 10 of the Act cuts down on the effectiveness of Section 10(b), for no statute "precludes judicial review" of the narrow type here invoked, and agency action in interpreting a law is not committed to agency discretion. The legislative history of the A. P. A. makes it abundantly clear that it was the Congressional intent to do what Section 10(b) on its face does, namely, make a declaratory judgment action an alternative remedy to habeas corpus under facts such as here exist.

Moreover, declaratory relief is wholly appropriate and reasonable here. Habeas corpus is presently unavailable, and there is no justification for requiring respondent to be taken into custody, with all the burdens that involves, before he can obtain judicial interpretation of a controlling statute. Under the instant facts declaratory relief is expeditious, convenient and accordant with modern concepts of business-like adjudication. Moreover, even assuming that habeas corpus were available, Rule 57 of the Federal Rules of Civil Procedure provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

## II

Section 3(a) of STSA, requiring military service from every male person "residing in the United States" had no application to respondent and in no way subjected him to the requirement of military service for the reason that he was not a person "residing in the United States". Respondent came here as a temporary visitor in August, 1939. War conditions compelled him to remain here. He therefore had to earn a living here and accepted employment. This was a violation of his temporary visitor's status, and on May 15, 1941, a warrant of deportation issued against respondent because he had accepted employment. This warrant remained in effect until June 10, 1946. Thus it was in effect at all relevant times, commencing at a date almost a year before respondent's Selective Service Board on March 26, 1942, sent him Form DSS 301 and informed him that because the warrant of deportation was extant, the most appropriate thing for him to do was to execute the form. The sole reason that respondent remained in the United States after May 15, 1941, was the physical impossibility, caused by the war, of actually deporting him. The words "residing in the United States" as used in Section 3(a) exclude a temporary visitor and even more clearly exclude a person such as respondent under a warrant of deportation whose expulsion awaited only the physical opportunity of executing it. This conclusively appears from the meaning of "residence" in international law and under numerous United States statutes and decisions. There is not one word in the legislative history of Section 3(a) indicating a departure by Congress from the well-settled meaning of the words "residing in the United States". Section 3(a) had no application to respondent, and the filing of Form DSS 301 was a nullity.

III

Section 3(a)'s provision for debarment from citizenship is inapplicable to respondent for the additional reason that Denmark was not a "neutral country" within the meaning of that section. While the precise status of Denmark at any given time from the date of German occupation on April 9, 1940, to 1945 presents difficult questions, the one clear thing is that she was not neutral. This was the view of our State Department and President. The *ex parte* determination of the Director of Selective Service that Danish subjects were to be treated as subjects of a neutral country for STSA purposes, cannot prevail, on a question so fraught with international implications as is that of a nation's neutrality, against the viewpoint of the organ of our Government which is its voice in foreign affairs. In any event, even attributing to the Director's determination its maximum possible significance, the result is that we have a situation of diverse executive viewpoints on the question of Denmark's neutrality. Under these circumstances, there is nothing in the "political questions" doctrine to preclude a court from adhering to the most authoritative voice, and refusing to look to a contrary decision of a subordinate agency. Indeed, a court is bound so to adhere, especially when the subordinate's opinion has no support in the facts. The conclusion that Denmark was "neutral" has no support in the facts.

## ARGUMENT

### Preliminary Considerations

There is no merit to the contention now advanced by petitioners for the first time, after almost three years of litigation, that the case at bar does not present a justiciable controversy (Pet. Br. 13-20).

At another stage in their argument, petitioners cite nine recent decisions of the Courts of Appeals of three

different circuits which they say hold that, "In habeas corpus proceedings, an alien facing deportation can raise every question that he would be entitled to raise in an action such as the present one." (Pet. Br. 56, at n. 22). Obviously if, as petitioners argue, an order denying suspension of deportation presents no case or controversy in a declaratory judgment action, it presents none in habeas corpus. The matter presented by the two proceedings is identical, namely: Was suspension of deportation denied because of error of law? Yet, as petitioners have shown us, the Courts of Appeals of four circuits (two courts on habeas corpus, the court below in a declaratory judgment action, and one court in both habeas corpus and declaratory judgment proceedings) have failed to intimate even a doubt that this type of case is justiciable. We submit that the reason is that the newly-found contention is insubstantial.

For purposes of considering this contention, Section 19(c) of the Immigration Act may be summarized as follows:

1. If after the judgment in this case has brought about the exercise of the power of suspension on a lawful basis, the Attorney General suspends the deportation of respondent for a period longer than six months, he is required by the statute to report the case to Congress.

2. If Congress, prior to the end of the succeeding session, passes a concurrent resolution favoring the suspension of deportation, the deportation proceedings must be cancelled; if such a concurrent resolution is not passed by the end of said succeeding session, respondent must be deported as provided by law.

In respect of these provisions, petitioners state: "It is clear, therefore, that when the Attorney General acts favorably upon an application for suspension of deportation

pursuant to Section 19(c), he is in effect making a recommendation to the Congress." (Pet. Br. 14).[4]

Whether or not the effect of the suspension of deportation by the Attorney General is a "recommendation" as to the ultimate status of the alien, it is clear that *the suspension does have a positive legal effect in that it terminates the deportability and fixes the alien's status at least for the period until Congress acts favorably or until the end of the following session of Congress, without further action by Congress or any other agency.*

Petitioners rely upon the dicta contained in *Hayburn's* case, 2 Dall. 409 (1792), *United States v. Ferreira*, 13 How. 40 (1851), and *Gordon v. United States*, 117 U. S. 697 (1864),[5] to the effect that "when the decision of the court was subject to the revision of a Secretary *and Congress*, it was not the exercise of a judicial power, and could not therefore be executed by the court."[6] (117 U. S. 703,

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[4] But the question is not, as petitioners assume, whether justiciability would exist had the Attorney General suspended deportation. It is his refusal to do so—solely because of his mistaken interpretation of a statute as we hereinafter show—that prevents respondent's case from being reported for Congressional consideration.

[5] It will be noted that in these cases, it was the conclusions of the courts that were directly subject to administrative or Congressional reversal; here, Congress would in no event act upon the declaratory judgment as such, but only on the Attorney General's suspension order.

[6] There is no serious contention made by petitioners that the discretion vested in the Attorney General in connection with suspension of deportation deprives the case of its justiciability (see Pet. Br. 15, n. 2). Indeed there could not be, for, as this Court

quoted with emphasis added in Pet. Br. 17). Petitioners would bring the instant case within the scope of such dicta, on the assumption that the court's act herein, as in the cases relied upon, will be *completely ineffective* unless and until Congress acts. But precisely the contrary is true.

It will also be noted that the dicta petitioners cite are from cases decided prior to 1865. Indeed, the statements of Chief Justice Taney, in *Gordon v. United States*, 117 U. S. 697 (1864), never were adopted by this Court. The opinion reported at 117 U. S. 697 was left by Chief Justice Taney at his death October 12, 1864, and was not adopted as the opinion of the Court, nor was it even published until some twenty years later. The *decision* in *Gordon's* case was rendered, after reargument, on March 10, 1865. 2 Wall. 561-562. In *United States v. Jones*, 119 U. S. 477 (1886), it was held that the reason for which the Court found that *Gordon's* case did not present a "case or controversy" was that the judgment of the Court of Claims was subject to the revision of the head of the executive department, and not at all that Congress might fail or refuse to make an appropriation and thus frustrate the judicial decision. In the *Jones* case, it was held that the change of the statute by which the executive officer was deprived of his power of revision made the controversy justiciable, even though the duty of the Secretary of the Treasury was only to pay out of " 'any general appropriation made by law for the payment and satisfaction of

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stated in characterizing the decision in *Perkins v. Elg*, 307 U. S. 325, 349 (1939):

> "Even in some discretionary matters it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction." *Arenes v. United States*, 322 U. S. 419, 432 (1944).

private claims, on presentation' to him 'of a copy of said judgment, certified' according to law. * * *"

In *Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447 (1932), mandamus and prohibition denied 285 U. S. 526, the subject was reviewed in an exhaustive opinion. There it was said that *United States v. Jones*, 119 U. S. 477 (1886), "renders the *Gordon* case of no value as a precedent so far as the jurisdiction of this court is concerned". The opinion of the Court of Claims went on to point out that all judgments, even those of the Supreme Court, in which the United States is a defendant to a money claim, are dependent upon the appropriation of funds by Congress before they can become effective (Art. I, Sec. 9, U. S. Constitution) and yet, since the *decision* in *Gordon v. United States, supra*, there had been no doubt that such cases present justiciable controversies. 73 C. Cls. 497.

Of course, it is the nature of the Congressional power that Congress, by action or inaction, may expand or contract the effect of decisions previously made by administrators or courts. Cf. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, 423-424 (1946). Indeed, the Declaratory Judgment Act itself would seem to represent such Congressional action. Compare *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274, 289 (1928), with *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937). Whether or not Congress might choose to enlarge the duration of the suspension of deportation beyond the period ending with the conclusion of the succeeding session of Congress, it is clear that the power of the Attorney General to suspend deportation for that considerable period of time is not, under existing statutes, subject to any immediate revision by the Congress or any other agency. Of course, it is conceivable that Congress might terminate all suspensions of deportation and thus vitiate all prior decisions of the Attorney General. The existence of such Congressional

power permeates nearly all matters which come before courts, and yet no serious representation has ever been made that by reason of its existence the decisions of courts are denied judicial character.[7]

Petitioners' contention of lack of justiciability is insubstantial. We therefore turn to the the issues presented below, and stated in respondent's Questions Presented.

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[7] It is suggested that the most petitioners' contention would possibly justify is dismissal of certiorari as improvidently granted, for it seems probable that jurisdiction below is in any event sustainable on the ground that the courts below functioned other than as Article III courts. That District of Columbia courts constitutionally may do so is clear, *O'Donoghue v. United States*, 289 U. S. 516, 546 (1933); *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-443 (1923), and seems conceded (Pet. Br. 20, n. 3). We emphasize that the Declaratory Judgment Act confers on "*any* court of the United States" the power to render a declaration in appropriate cases. (The language in such cases as *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 239-241 (1937), respecting the Declaratory Judgment Act's applicability only in Article III controversies, must be understood in the light of the fact that all such cases arose in Article III courts.) In 28 U. S. C. A. §451, "court of the United States" is defined as including, among others, the district courts of the United States for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court. These are not Article III courts. *O'Donoghue v. United States, supra*, 535-536; *Ex parte Bakelite Corp.*, 279 U. S. 438, 452, 458-460 (1929). The A. P. A. confers power of review by declaratory judgment on "any court of competent jurisdiction.". §10(b). Consequently it seems clear that Congress was unconcerned with the theory under which the power of the reviewing court was derived. No subtle discrimination between functioning under Article III, and other functioning, was being made, for Congress was merely assuring that: "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." A. P. A., §10(c).

## I

## JUDICIAL REVIEW OF THE ATTORNEY GENERAL'S ERRONEOUS INTERPRETATION OF A STATUTE MAY BE HAD IN A DECLARATORY JUDGMENT ACTION AFTER EXHAUSTION OF ADMINISTRATIVE REMEDIES, WHERE SUCH INTERPRETATION ALONE PREVENTS SUSPENSION OF DEPORTATION.

### A. Preliminary Analysis.

The Attorney General has found to exist all facts necessary to suspend respondent's deportation—that he has been a person of good moral character for the past five years and that his deportation would cause an economic detriment to his United States citizen wife. But he also concluded that respondent is ineligible to naturalization, and on that ground only he denied suspension of deportation. The conclusion of ineligibility is predicated solely and exclusively on the Attorney General's interpretation of STSA, Section 3(a). Respondent's substantive case is that such interpretation is erroneous. He exhausted all administrative remedies in an attempt to get what he contends is a correct interpretation (R. 3-4; Pet. Br. 22). He was not in custody at the time he brought suit, nor is he today.

The procedural question presented therefore is: When the Attorney General finds that all facts necessary for suspension of deportation exist but denies suspension solely because he misinterprets a relevant statute, may an applicant for suspension for whom habeas corpus is not available, after exhausting administrative remedies, obtain a correct interpretation of the statute in a declaratory judgment action?[8]

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[8] The decision of the Court of Appeals below accords with *United States ex rel. Trinler v. Carusi*, 166 F. 2d 457 (C. A. 3d, 1948), which held that a deportation order is judicially reviewable under

Petitioners' contention in the negative is this: The provision of Section 19(a) of the Immigration Act of 1917 that "the decision of the Attorney General shall be final" when he orders deportation, impliedly precludes judicial review. Conceding the availability of habeas corpus in deportation proceedings, petitioners argue that it alone is available and that it does not constitute "judicial review". Therefore, petitioners conclude, the A. P. A.'s general guarantee of judicial review does not avail respondent, because such general guarantee is restricted by Section 10's introductory clause, "Except so far as * * * statutes preclude judicial review."[9]

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the A. P. A. The *Trinler* case later abated on technical grounds, but was followed in *Podovinnikoff v. Miller*, 179 F. 2d 937 (C. A. 3d, 1950). The Court of Appeals for the Second Circuit has found it unnecessary to decide the issue. *Connor v. Miller*, 178 F. 2d 755 (1949); *Azzolini v. Watkins*, 172 F. 2d 897, 898 (1949). Thus both Courts of Appeals which have decided the procedural issue have been in accord with respondent's position, as has at least one District Court, *United States ex rel. Cammarata v. Miller*, 79 F. Supp. 643 (S. D. N. Y., 1948).

[9] Petitioners ignore that the House Report, referring to this clause, states: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must *upon its face* give clear and convincing evidence of an intent to withhold it." (Emphasis added; Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 275). Petitioners apparently now make no contention that the other introductory clause of the A. P. A.'s Section 10—"Except so far as * * * agency action is by law committed to agency discretion"—negates Section 10's general guarantee of review. Such a contention is disposed of in the opinion below (R. 16). An abundance of legislative history also disposes of it. In addition to the citations in the opinion below, see Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 36; pp. 310-311, 368-369. The intention to confine agencies within applicable statutory limits is also clear on the face of A. P. A., Section 9(a): "No sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law." Of course these limits include those present in STSA. Section 3(a), as well as those arising directly from the immigration laws.

We will show that each of petitioners' premises is fallacious. Petitioners' errors seem to arise from their confusion of the problem of *scope* or *extent* of review—that is, the problem of the *type of issues* judicially reviewable—with the problem of *manner* or *technique* of *getting review*. It is true that the Immigration Act's provision for administrative finality rigidly limits the type of issues reviewable. It is doubtless also true that the issues reviewable are no broader now than they were when habeas corpus was the only method of getting review. But it is equally true that since the enactment of the Declaratory Judgment Act and the A. P. A. there is now an additional *method* of getting the limited review always available by habeas corpus. As stated in the Senate Committee Comparative Print, A. P. A., Sen. Doc. 248, 79th Cong., 2d Sess., pp. 37-38:

> "The exceptions stated in the introductory clause of Section 10 appear to set forth the proper *type of issues* not subject to judicial review." (Emphasis added).

**B. Section 19(a) of the Immigration Act of 1917 Does Not Preclude Judicial Review Within the Meaning of Section 10 of the A. P. A.**

(1) *The Provision of Section 19(a) That the Attorney General's Decision Shall Be Final Does Not Preclude Review of the Type Here Invoked.*

In the face of the declaration of Section 19(a) of the Immigration Act of 1917, that "the decision of the Attorney General shall be final" in cases where deportation is ordered, it has long been settled that the administrative decision is judicially reviewable where it contravenes constitution or statute, or is made without a fair hearing or supporting evidence. *Gegiow v. Uhl*, 239 U. S. 3, 9 (1915); *Kwock Jan Fat v. White*, 253 U. S. 454 (1920); *Mahler*

*v. Eby*, 264 U. S. 32 (1924); *Bridges v. Wixon*, 326 U. S. 135, 156 (1945).[10]

Judicial review of cases governed by a statutory declaration of administrative finality is not limited to habeas corpus. Depending on the nature of the case, and the available judicial techniques, review may otherwise be had, e. g., *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 334 (1932) (review in immigration case by suit to recover fines); *Perkins v. Elg*, 307 U. S. 325, 349-350 (1939) (review in deportation case by declaratory judgment action); *Estep v. United States*, 327 U. S. 114 (1946) (review in selective service case by defense of improper classification in criminal trial).

As stated for this Court by Mr. Justice Holmes in *Gegiow v. Uhl*, *supra*, at p. 9:

> "The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. * * * The conclusiveness of the decisions of immigration officers under § 25 [which provided that the adverse administrative decision shall be final] is conclusiveness upon matters of fact."

Thus it is clear that the *finality* required by Section 19(a) is effectuated when judicial review is restricted to the *type of issues* historically deemed proper for the court —*matters of law*, to use a shorthand expression. Such

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[10] The United States Commissioner of Immigration and Naturalization, in an address published in *Federal Administrative Procedure Act and the Federal Administrative Agencies*, Vol. VII of N. Y. U. School of Law Institute Proceedings, set out three categories of grounds on which deportation cases have been reversed on court review:

> "1. The order of deportation was not supported by substantial evidence."
>
> "2. The Attorney General's order was not within the scope of his legal authority."
>
> "3. The petitioner was not accorded a fair hearing." (pp. 298-299).

*finality* is not concerned with the method of obtaining review, since obviously review in a declaratory judgment action can be, and here is, as strictly limited in scope as review by habeas corpus, namely, to a naked question of statutory interpretation.[11]

Thus is thrown into bold relief the error of petitioners' statement that the decision below ignores "both the command of the Congress that the Attorney General's decision shall be final and the traditionally narrow scope of habeas corpus" (Pet. Br. 33).

From any legitimate viewpoint of administrative finality, it matters not one whit whether the narrow issue reviewable be reviewed by habeas corpus or by the more modern, and under the instant facts more civilized, method of a declaratory judgment action. The latter permits adjudication of the naked question of law involved, on behalf of a person concededly of good character and law-abiding habits, without the necessity of arrest, confinement and severance from family and employment.

### *(2) Habeas Corpus Is Judicial Review Within the Meaning of Section 10 of the A. P. A.*

In arguing that habeas corpus is not judicial review, and that therefore its historic availability in deportation proceedings does not mean that such proceedings are subject to "judicial review" within the purview of the A. P. A.'s Section 10, petitioners put themselves in the inconsistent position of contending that the introductory clause of Section 10 expressly contravenes Section 10(b); for the latter clearly states that one form of judicial review is habeas corpus.

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[11] Petitioners themselves state: "It [the instant case] involves only a question of statutory interpretion which can be resolved in habeas corpus proceedings" (Pet. Br. 40).

When it is remembered that Section 10's exclusionary clause—"Except so far as * * * statutes preclude judicial review"—concerns *type of issue*, and that the *type of issue* in a declaratory judgment action can be, as it here is, limited precisely to what could be raised in habeas corpus, it is clear that there is nothing in such exclusionary clause to negate the Act's philosophy, expressly stated in Section 10(b) that habeas corpus is a "form of proceeding for judicial review".

*(3) Assuming, Arguendo, That Habeas Corpus Is Not Judicial Review, Nevertheless Judicial Review in Deportation Cases Has Existed Since 1934.*

Assuming, *arguendo*, that habeas corpus is not judicial review within the purview of Section 10 of the A. P. A., nevertheless other judicial review of questions of law was available in deportation proceedings at the time of enactment of the A. P. A.

It is true that prior to 1934, the only recognized method of reviewing a deportation case was by writ of habeas corpus. *Fafalios v. Doak*, 60 App. D. C. 215, 50 F. 2d 640 (1931); *Darabi v. Northrup*, 54 F. 2d 70 (C. A. 6th, 1931); *Kabadian v. Doak*, 62 App. D. C. 114, 65 F. 2d 202 (1933); *Imperiale v. Perkins*, 62 App. D. C. 279, 66 F. 2d 805 (1933).

However, in 1934 the passage of the Declaratory Judgment Act furnished an alternative method of review. In 1939, this Court without dissent sustained the use of the declaratory judgment action to test the legality of the deportation of one claiming to be a citizen of the United States. *Perkins v. Elg*, 307 U. S. 325, 349-350 (1939). The *Elg* decision is consonant with Rule 57, Federal Rules of Civil Procedure (effective 1938), which provides in part:

> "* * * The existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate. * * *"[12]

Furthermore, diligent search by counsel on both sides, and the exhaustive opinion of the court below have not produced a single decision, after the passage of the Declaratory Judgment Act, holding that the only method of reviewing a deportation case is by writ of habeas corpus.[13]

Thus, none of the premises relied upon by petitioners to support their argument against the A. P. A.'s authorization of the instant procedure is sustainable.[14] The "finality" of the Attorney General's decision does not preclude judicial review of the narrow type here invoked. Habeas corpus is judicial review within the purview of Section 10 of the A. P. A. and, in any event, judicial review by a declaratory judgment action has existed since 1934.

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[12] The Notes of the Advisory Committee on Rules for Civil Procedure, referring to this provision of Rule 57, explain:

> "* * * A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

[13] *Bata Shoe Co., Inc. v. Perkins*, 33 F. Supp. 508, 509 (D. D. C., 1940), contains an *obiter dictum* which appears to follow the earlier cases, but the decision is clearly grounded on the thoroughly sound principle that collective judicial declaration of non-deportability for a large group of immigrant workers would be improper, antecedent as it was to *any* administrative action. The *dictum* states no more than that the issue of non-deportability can be properly raised on the administrative level, and if the administrative decision is adverse, can be judicially decided on habeas corpus.

[14] There is absolutely no inference to be drawn either for or against the position of petitioners from the terms of §106, S. 3455, 81st Cong., 2d Sess., to which they refer (Pet. Br. 29, n. 9). The attempts by both sides to draw inferences from legislation introduced after decisions adverse to the Government under the A. P. A. were rejected in *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47 (1950).

We now turn to a positive showing that under the Declaratory Judgment Act and the A. P. A. the instant procedure is clearly proper.

**C. The Plain Meaning of Section 10(b) of the Administrative Procedure Act Makes the Declaratory Judgment Action a Proper Form of Review Under the Instant Facts.**

In 1946, after more than ten years of consideration, Congress enacted the A. P. A.[15] Section 10(b) provides:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, *any applicable form of legal action (including actions for declaratory judgments* or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *" (Emphasis added).

It is plain that Section 10(b) expressly makes the declaratory judgment action applicable for review of any administrative proceeding subject to Section 10, with only one class of cases excepted. The single exception exists when there is some adequate "special statutory review proceeding". But *no special proceeding* is provided by statute for the review of deportation cases. Of course, habeas corpus is not a "special statutory review proceeding". The Senate and House Committee Reports make plain that Section 10(b) includes within "any special statutory review proceeding" only these "wholly created by statute" and "*common-law forms referred to and adopted by other statutes as the appropriate method of review.*" (Emphasis added). Sen. Rep.

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[15] A brief and convenient resume of the last ten years of the legislative history of the A. P. A. is contained in the Report of the House Committee on the Judiciary, H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., at pp. 241-250.

No. 752, 79th Cong., 1st Sess.; H. Rep. No. 1980, 79th Cong., 2d Sess., reprinted in Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212-213, 276 (1946).[16]

Thus, by Section 10(b)'s inescapable mandate, a declaratory judgment action is now an alternative method of review in deportation proceedings.

**D. The Legislative History of the A. P. A. Exhibits Congress' Intention to Approve and Extend the Use of the Declaratory Judgment Procedure Such as This Court Approved in the Case of Perkins v. Elg.**

The A. P. A. as finally enacted into law was derived from a bill introduced in the Senate by Senator McCarran in January, 1945. S. 7, 79th Cong., 1st Sess. (see Sen. Doc. No. 248, pp. 1, 11; at p. 155, H. R. 1203 is reprinted, which was identical with S. 7). The McCarran bill (and its House counterpart), as introduced, read as follows:

> "Sec. 10 * * *
> (b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. *Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action.* * * *"
> (*Id.*, p. 160, emphasis added).

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[16] Furthermore, the highly respected Advisory Committee on Rules for Civil Procedure stated, in its Notes on the use of declaratory judgments under Rule 57, that "* * * general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings."

The Senate Judiciary Committee, which first considered the bill, issued in June, 1945, an explanatory Committee Print which deleted the portion of S. 7 emphasized above. The explanation given for the deletion was as follows:

> "Although the declaratory judgment 'proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields.' (*Final Report*, Attorney General's Committee, p. 81). In his letter accompanying the veto of the Logan-Walter bill, the Attorney General stated that 'Under the Declaratory Judgments Act of 1934, any person may now obtain a judgment as to the validity of * * * administrative rules, if he can show such an interest and present injury therefrom as to constitute a "case or controversy."' (H. Doc. No. 986, 76th Cong. 3d Sess.)". (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 37).[17]

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[17] The full quotations are as follows:

(a) *Final Report*, Attorney General's Committee, p. 81:

"Since June 1934, the Federal courts have been empowered to grant declaratory judgments in 'cases of actual controversy.' While this proceeding has not yet been extensively used to bring Federal administrative action before the Federal courts, its potentialities are indicated by its wide use in other fields. [Citing Borchard, *Declaratory Judgments* (1934)]. The declaratory judgment is a general remedy not confined to any particular type of controversy and having no special provision for administrative law. Its utility for judicial review is, therefore, largely in the control of the courts."

(b) *Letter*, dated December 11, 1940, from the then Attorney General to the President:

"With a purpose no doubt of preventing administrative agencies from magnifying their powers through promulgation of rules, section 3 of the bill conveys a sweeping grant of jurisdiction to the United States Court of Appeals for the District of Columbia:

> upon petition filed by any person substantially interested in the effects of any administrative rule * * * to hear and determine whether any such rule * * * is in conflict with the

Thus it is clear that the broad grant of declaratory judgment jurisdiction contained in S. 7 as introduced was deleted *precisely because the Senate Committee in charge of the bill approved the recommendation of the Attorney General's Committee and accepted the assurance of the Attorney General that judicial review by declaratory judgment actions did not require further grant of jurisdiction beyond that already contained in the Declaratory Judgment Act of 1934.* Since the Act of 1934 already furnished the statutory basis for the district courts to take jurisdiction, no new provision was needed. The statement in the Committee Print clearly approves the use of the declaratory judgment procedure for review of administrative agencies, and encourages it.

Likewise, the rest of the legislative history is replete with affirmations of Congress' belief in the efficacy and desirability of the declaratory judgment as a method of reviewing administrative agencies. The reports of the Committees of the Senate and of the House contained the following observation on the propriety of review by declaratory judgment:

> "* * * The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action." (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 212, 276).

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Constitution of the United States or the statute under which issued.

"* * * [The Supreme Court has] adhered to the principle that it will decide only law questions when they arise in concrete litigations coming within the legal concept of a 'case' or a 'controversy.'

"This bill must be interpreted as expanding that power, or it has no effect whatever. Under the Declaratory Judgment Act of of 1934 any person may now obtain a judgment as to the validity of such administrative rules, if he can show such an interest and present injury therefrom as to constitute a 'case or controversy.' This bill removes that limitation or it does nothing." (H. Doc. No. 986, 76th Cong., 3d Sess., p. 6).

Obviously, if a declaratory judgment action to determine the validity or application of agency action is proper before the statutory form of review, *a fortiori*, such form of action is proper where no statutory review proceeding exists.[18]

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[18] Petitioners make much of certain statements made at various times by the then Attorney General (Pet. Br. 46) and by Representative Walter, spokesman for the House Committee (Pet. Br. 45).

(a) In letters dated October 19, 1945, the then Attorney General stated to Senator McCarran and Representative Sumners: "It [Section 10] also restates the law governing judicial review of administrative action." (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 224, 407). Petitioners would make of this a binding interpretation which in cases subject to Section 10 would freeze the judicial review procedures to those methods of review which were generally employed at the time of the passage of the A. P. A. To construe remedial legislation in such a manner would substantially defeat its purpose, about which other expressions of Congress are so clear. Furthermore, assuming that the statement of the Attorney General be given full weight as indicating that a "freeze" on review procedures was intended, it must be remembered that the *declaratory judgment procedure*, as authorized by the Act of 1934, *was one of the existing methods of review. Perkins v. Elg*, 307 U. S. 325 (1939). See *Final Report*, Attorney General's Committee, p. 81, *supra*.

(b) On May 24, 1946, in the House, Representative Walter, spokesman for the Committee, made the following statement as to Section 10:

> "These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adoption of traditional forms of action in cases where Congress had made no contrary provision for judicial review." Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 369.

The import of this statement is not at all adverse to the respondent's position. The "situation as * * * now generally understood" included the use of declaratory judgment procedure. There are no "special proceedings" provided by Congress for deportation cases. No "venue arrangement" in the sense intended by Representative Walter is being disturbed, because no special court to review administrative cases is being set up, and the general venue

**E. Judicial Review by Declaratory Judgment is Appropriate, Convenient and Reasonable in the Instant Situation.**

Petitioners' argument, that the practical consequences of the decision below require its reversal (Pet. Br. 56-62), essentially is that declaratory judgment procedure, as compared to habeas corpus, is a less desirable type of review from the administrative viewpoint. We will pass the obvious points that this argument approaches the question almost entirely from the viewpoint of administrative convenience, relegating to the inconsequential considerations of personal liberty; and that inconvenience of administration cannot undo the law.

Petitioners stress the burden of work on the Immigration and Naturalization Service. They say that declaratory actions, if substituted for the allegedly more expeditious and administratively convenient habeas corpus proceedings which petitioners say are adequate, would further unduly burden the Service. They also say that the decision below will result in duplicatory review and will excessively impose upon District of Columbia courts. At best, petitioners' arguments are speculative. Moreover, their underlying assumptions can be shown to be fallacious.

(1) The same reasons which render declaratory review appropriate under the instant facts in order to place the exercise of discretion on a lawful basis, clarify the inadequacy here of habeas corpus. At this stage, habeas cor-

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statutes apply. (Compare the Logan-Walter Bill referred to *supra*, at n. 17(b), in the quotation from the Senate Committee Print of June, 1945.) The "statutory adoption of traditional forms of action" where not in conflict with statutory methods of review includes within the scope of "traditional forms of action", among others, the declaratory judgment action. As stated in Section 10(b), the non-statutory review procedures include "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)."

pus is not available to respondent. He is not in custody.[19] In order to make habeas corpus available, it would be necessary for respondent to go into custody, however sound his substantive case. As stated in the opinion below: "To compel him to go into custody before he can have his rights determined would be to defer to formalism and order the performance of a useless act, an act which may require him to sacrifice his possessions in preparation for leaving the country" (R. 18). Consequently no remedy other than declaratory relief is adequate. At any rate, under Rule 57, Federal Rules of Civil Procedure:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

(2) Petitioners argue that considerations of expediency make restriction of the available remedies to habeas corpus essential. They contend that habeas corpus is a summary proceeding required to be resolved expeditiously.[20] (Pet. Br. 58). But the immediate answer to this is that because of the utility of the declaratory judgment action in securing prompt settlement of issues of this type, Rule 57, Federal Rules of Civil Procedure, provides:

> "The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Thus in appropriate cases, declaratory judgment proceedings can be disposed of just as promptly as habeas corpus cases. A district judge would hardly be reluctant to expedite such proceeding on request of petitioners.

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[19] Cf. petitioners' statement of the procedural question (Questions 1 and 2) in their Petition for Certiorari (p. 2) with their statement of it (Question 2) in their Brief (p. 2).

[20] The three weary years in which *Bridges v. Wixon*, 326 U. S. 135 (1945), was in the courts indicates the dubiousness of this assumption.

Many of petitioners' assumptions that great burdens will ensue from the decision below make mountains of molehills. Out of the tens of thousands of deportation hearings in which orders of deportation have been issued in recent years, only the following habeas corpus review proceedings have been commenced in all the Federal district courts:[21]

| *Fiscal Year* | *No. of Proceedings* |
|---|---|
| 1950 | 217 |
| 1949 | 225 |
| 1948 | 193 |
| 1947 | 260 |
| 1946 | 421 |
| 1945 | 72 |

Of course, it is scarcely sound for petitioners to argue as they do that the very harshness of the habeas corpus method—requiring the alien to go into custody ready to be deported—has discouraged attempts to obtain review in "thousands" of cases which will now be presented under the declaratory judgment proceeding if the decision below is affirmed. Such an argument impugns either petitioners' own administrative process or the ethics and common sense of the Federal Bar. The direct answer to it is that there are few cases indeed which present, as does the instant one, a naked question of statutory interpretation. Nor is there any substantial risk that the availability of the declaratory judgment in cases such as this—where a non-discretionary question presents itself after exhaustion of administrative remedies but before the alien is taken into custody—will lead to any serious duplication of review proceedings. Well-recognized principles of *res judicata* and collateral estoppel are available to

[21] Figures are taken from Table C(2) in the Annual Reports of the Director of the Administrative Office of the United States Courts for the respective years.

prevent an abuse of judicial process.[22] Furthermore, it is highly probable that any slight increase in the total number of review procedures commenced would be offset by the substantial advantage to the Immigration and Naturalization Service and to the Attorney General in the reduction of the number of administrative deportation proceedings conducted in an erroneous view of the law, or *dubitante* as to the correct statutory interpretation.

(3) Petitioners contend that declaratory judgment actions in this class of cases will burden the courts of the District of Columbia unduly (Pet. Br. 59).[23] To this,

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[22] In so stating, respondent is not unmindful of the holdings that habeas corpus is not subject to the usual rigidity of *res judicata* and collateral estoppel by judgment, e. g., *Salinger v. Loisel*, 265 U. S. 224, 230 (1924); *Price v. Johnston*, 334 U. S. 266, 287-290 (1948). However, as the opinions last-cited make clear, the prior decision *is* binding in so far as the issues later tendered were actually fairly litigated before. Of course, petitioners in posing this alleged difficulty envisage two unlikely situations: (1) that a prior declaratory suit will be accorded no more binding force than is currently accorded to a denial or dismissal of a writ of habeas corpus; (2) that repetitious attempts to obtain judicial reversal of administrative determinations will be more numerous under declaratory procedure than successive petitions for habeas corpus are now.

[23] Of course, if there is any undue inconvenience to the Immigration and Naturalization Service and to the Attorney General in having these few declaratory judgment actions heard in the District of Columbia, perhaps the pressure of business might be redistributed by petitioners' declining to interpose objections for improper venue. Much of the work of the District Court for the District of Columbia has been brought here simply because the Federal agencies insisted that it be litigated here. See the comment of District Judge Hincks on a declaratory suit brought in the District Court for the District of Connecticut: "The parties are before the court; the plaintiff now resides in this district and the defendant very sensibly has appeared without raising any technical questions as to venue which might have required the plaintiff even in these crowded times to file suit in Washington." *Brassert v. Biddle*, 59 F. Supp. 457, 462-463 (D. Conn., 1944), affirmed 148 F. 2d 134.

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there are two brief answers: (i) the Court of Appeals for the District of Columbia has decided that declaratory judgment procedure *is* appropriate for this narrow category of cases and therefore has decided that, on balance, the convenience of the District of Columbia Courts will not be disrupted;[24] (ii) expense, burden, and inconvenience is an argument more properly directed to Congress, which has provided this procedure. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-47 (1950).

(4) Lastly, although petitioners formally disclaim reliance on the defense of non-exhaustion of administrative remedies (Pet. Br. 22)—a disclaimer necessitated by good faith in that the fact of exhaustion (R. 3, 4) has never been controverted—nevertheless petitioners continue to make statements which seem to indicate reliance on the theory of non-exhaustion. Thus:

> "If the respondent's contention is upheld, there will be created possibilities for piecemeal review of the deportation process * * * More broadly, all sorts of legal issues relating to deportation could be singled out for judicial review * * *." (Pet. Br. 23-24).
>
> "Administrative action which is not yet reviewable because of failure to exhaust administrative remedies is not made reviewable by the Declaratory Judgment Act" (Pet. Br. 37).
>
> "Thus, judicial intervention is premature until the alien is taken into custody" (Pet. Br. 61).

Therefore we wish to emphasize that in every *theoretical* and *practical* sense, administrative remedies were *utterly* exhausted, and that the case is ripe for judicial determination of the naked question of law involved.

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[24] It must be remembered that in reaching this decision, the court below was fully cognizant that it had held in *Kaminer v. Clark*, 85 U. S. App. D. C. 205, 177 F. 2d 51 (1949), that declaratory judgment procedure was *not* available in cases in which the alien was already in custody in another district and therefore had a ready remedy by petition for habeas corpus (See op. below, R. 18).

Every requirement making declaratory judgment procedure appropriate is present here. The Attorney General, through his authorized agent, the Board of Immigration Appeals, has refused to exercise the power to suspend deportation, *solely on the grounds that the respondent is not eligible for citizenship* (R. 3-4). He has finally decided the only matter that is here relevant: the meaning of a statute. All that remains for petitioner to do is either to depart voluntarily or to go into custody for deportation.

Petitioners would oblige the respondent, in order to test his rights, to sacrifice his possessions, to abandon his work, and to forego the substantial advantage of departing voluntarily to a country of his own choice in lieu of deportation to a designated country. All this would have to be suffered merely because the physical execution of the order has not yet taken place, even though the administrative officials have refused to exercise their discretion to suspend the order, solely because of an erroneous interpretation of the statute. With equal logic, petitioners might argue that habeas corpus would not lie after the alien has been taken into custody under a deportation order, simply because the physical deportation has not yet taken place, and hence the administrative process is incomplete.

Petitioners have had full opportunity to decide the interpretation which should be placed on STSA, Section 3(a), and have made their final decision adversely to respondent.[25] Solely as a result of that erroneous decision, petitioners have refused to exercise their discretionary power of suspension. Respondent does not seek through this declaratory judgment action to control the manner in

[25] Respondent went beyond the requirement of exhaustion of administrative remedies, even obtaining administrative reconsideration (R. 3).

which that discretion is exercised, but seeks only to confine its exercise within the limits of the controlling statutes. As this Court stated, in characterizing the decision in *Perkins v. Elg*, 307 U. S. 325, 349 (1939):

> "Even in some discretionary matters it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction." *Arenas v. United States*, 322 U. S. 419, 432 (1944).

## PRELIMINARY STATEMENT FOR QUESTIONS II AND III

The only substantive issue is whether respondent is ineligible for naturalization, as the Attorney General held, solely on the ground that on or about March 30, 1942, he filed with his Selective Service Board Form DSS 301, a Selective Service form provided for the use of aliens applying for exemption from military service under STSA, Section 3(a) (Op. R. 19). The answer depends upon the meaning of two clauses in Section 3(a). The portion of Section 3(a) involved reads:

> "Except as otherwise provided in this Act, every male citizen of the United States, and *every other male person residing in the United States* * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That *any citizen or subject of a neutral country* shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; *, * *" 54 Stat. 885, as amended December 20, 1941, 55 Stat. 845, 50 U. S. C. A. App. § 303(a).

Respondent's position is:

(i) Respondent was not "residing in the United States"; therefore he was not liable for military service, and the filing of Form DSS 301 was a nullity.

(ii) At the time Form DSS 301 was filed, Denmark, the country of which respondent was then "citizen or subject", was not a "neutral country", and therefore the filing of the form was a nullity.

The court below sustained the first ground and therefore found it unnecessary to decide the second (Op. R. 19-20, n. 6; 24). Either ground is sufficient to require affirmance.

## II

## RESPONDENT WAS NOT "RESIDING IN THE UNITED STATES"; THEREFORE HE WAS NOT LIABLE FOR MILITARY SERVICE, AND THE FILING OF FORM DSS 301 WAS A NULLITY.

### A. Preliminary Statement

Respondent entered this country as a temporary visitor in August 1939 to visit relatives and attend the World's Fair. Caught here by the war, he had to work to earn a living. His employment, a violation of his temporary visitor's status, resulted in a warrant of deportation against him effective May 15, 1941. Thus his temporary visitor's status merged into that of a deportee, which he remained at all relevant times. Therefore he clearly was not "residing in the United States" within STSA, Section 3 (a). A brief preliminary review of the historical background of Section 3 (a) is helpful.

Prior to the so called "Pearl Harbor" amendment to the STSA (December 20, 1941, when Section 3 (a) was amended to read as quoted above), no draft act in Ameri-

can history had subjected any aliens to military service, except those who had declared their intention of becoming United States citizens. Civil War Draft Act, March 3, 1863, 12 Stat. 731; Spanish-American War Draft Act, April 22, 1898, 30 Stat. 361; Selective Draft Act of 1917, as amended, §§ 2 and 5, 40 Stat. 78, 80, 955.

Even STSA as originally enacted in 1940 subjected to military service only "every male citizen of the United States and *every male alien residing in the United States who has declared his intention to become such a citizen* * * *". (Emphasis added; 54 Stat. 885) Not until December 20, 1941, did Congress broaden the definition by making every citizen and every other male person *residing* in the United States subject to military service and training, whether or not they had declared their intention to become citizens. Respondent believes it is clear that Congress by that amendment intended to subject to military service, in addition to declarant aliens, all other aliens ~~who had true~~ residence or domicile in the United States; but that it did not intend to include temporary visitors, sojourners, and most certainly of all, those under warrants of deportation whose actual expulsion awaited only the opportunity of carrying it out.

**B. Respondent Was Not "Residing in the United States", and STSA Section 3 (a) Is Inapplicable to Him.**

At the time of the passage of the amendment of December 20, 1941, the phrase "residing in the United States" had a well settled meaning in reference to aliens. It has always meant an alien admitted to the United States for permanent residence. See, e.g., Nationality Code, 54 Stat. 1142, 8 U. S. C. A. §707; 59 Stat. 658, 8 U. S. C. A. §1001; Alien Ownership of Land Act, 29 Stat. 618, 8 U. S. C. A. § 72. Conversely, where Congress intends to include all aliens physically present within the United States, it uses appropriate language, e.g., "every alien now or hereafter

in the United States", Alien Registration Act, 54 Stat. 673, 8 U. S. C. A. § 452. Absent any indication of Congressional intent to change the historic meaning of "residing in the United States", there is no reasonable basis whatsoever for concluding that these words in Section 3 (a) include a temporary sojourner under a warrant of deportation.[26] This we think is conclusively shown by precedents in numerous fields, and we shall consider several of the particularly significant fields. Such consideration will make clear that in respondent's status there was *no part* of *any* of the elements significant for residence, namely (i) permanence of stay, (ii) consent of the sovereign, and (iii) freedom of choice.[27]

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[26] As we show hereafter, there is *nothing* in the legislative background of Section 3 (a) to suggest that Congress was so far abandoning reason and history as to subject temporary sojourners to regular military duty.

[27] The Immigration and Naturalization Service, in a decision of its Commissioner, File No. A-6897992, October 10, 1949, listed the following factors generally relevant in determining whether an applicant for admission under the Displaced Persons Act, 62 Stat. 1009, 50 U. S. C. A. App. §1951, ff., had acquired a residence in a country other than the one from which he was displaced and the United States: (1) Length of sojourn; (2) Terms of admission or later modification thereof; (3) Ability to return to the intervening country under the existing regulations of that country controlling the travel of aliens; (4) Activities while in the intervening country; (5) Intentions; (6) Travel documents possessed by the applicant; (7) The presence of other members of the applicant's family who remain in the intervening country; (8) The restrictions placed upon the applicant by the regulations of that country; (9) Whether the applicant was the constant charge of social or humane organizations; (10) The policy of the government of the intervening country with respect to displaced persons, refugees, or other aliens; (11) The attitude of the intervening country with respect to applicants of particular religious, racial or political affiliations. It will be noted that factors (1), (3), (4), (5), (7), (8), relate to the permanence of stay in the country; (2), (3), (6), (8), (10), (11) concern the consent of the sovereign; and (4), (5), (8), (9) involve choice by the applicant.

The status of respondent in the United States was not unlike that of a displaced person in an intervening country, since respond-

1. *"Residence" In International Law*

In international law it is thoroughly established that a temporary visitor or a sojourner is not subject to military service in the country of his visit or sojourn. It has been held that only *citizens or domiciled foreigners* can be subjected to military service. Letter from Secretary of State Seward to Mr. White, July 10, 1868, 79 MS. Dom. Let. 73; quoted in IV Moore, Int. Law Dig., 57; Letter from Secretary of State Fish to Mr. Wing, April 6, 1871, Ms. Inst. Ecuador, I. 263, quoted in IV Moore, Int. Law Dig., 58. The principle was recognized in Art. VI of our treaty with Germany, December 8, 1923, which provides that nationals of the parties to the treaty may be drafted for compulsory military service against a third nation, only if they have *permanent residence* within the drafting nation's territories. 44 Stat. (Part 3) 2136, quoted in III Hackworth, Dig. of Int. Law, 600.

If, as is established, only a domiciliary or alien permanently resident in this country can be subjected to compulsory military service, *a fortiori*, it was not intended that a person like respondent, under a warrant of deportation and here only because it was physically impossible to expel him, should be subject to military service.

2. *"Residence" In Laws Regulating Temporary Visitors*

Our immigration laws draw a clear-cut distinction between an immigrant and a temporary visitor, 43 Stat. 154, 8 U. S. C. A. § 203, 8 CFR (1949) 176.101; 176.106-109;

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ent, although he had left Denmark voluntarily for his intended brief visit in the United States, was forced by the war to remain here, solely because return to Denmark, voluntary or otherwise, was physically impossible. Consequently, much the same considerations which are relevant to the displaced person who, having voluntarily left his country of origin for a temporary sojourn, later found return impossible, are significant in determining whether respondent was "residing in the United States".

176.201-203. An immigrant comes here for permanent residence or domicile, *United States v. Parisi*, 24 F. Supp. 414, 417-418 (D. Md., 1938); *International Mercantile Marine Co. v. Elting*, 67 F. 2d 886, 887 (C. A. 2d, 1933). A temporary visitor is not an immigrant, *United States ex rel. Di Mieri v. Uhl*, 96 F. 2d 92, 93 (C. A. 2d, 1938); he does not receive an immigration visa but a "temporary visitor's visa", 8 CFR (1949) 176.201; 176.106; 119.1-14, such as that given respondent. He is admitted to the United States for a limited period only and must intend to return to the country of his nationality or some other country. Moreover, he will not be given a temporary visitor's visa unless he presents reasonably conclusive evidence that he will be admitted to such country when he leaves the United States, 8 CFR (1949) 119.2(c). Thus a "temporary visitor" like respondent comes here on a conditional grant from the sovereign subject to revocation of his right to be here as soon as he violates his designated status. *Schacht v. Young*, 164 F. 2d 882, 883 (C. A. 5th, 1947). Consequently, when respondent violated his visitor's status by accepting employment and a deportation warrant was issued against him, any reasonable expectation that his stay might be permanent was eliminated. He was merely awaiting physical expulsion from the country. Even though circumstances *forced* respondent to accept employment here, the qualified nature of his right to be within the United States, determined by his original permission to enter brought about the issuance of a warrant of deportation on May 15, 1941. From that time on, until the warrant was withdrawn and his case reopened on June 10, 1946, he was subject to the warrant of deportation. Only physical impossibility due to the war prevented the execution of that warrant. Consequently respondent was not even in the United States as a visitor or sojourner, with the consent (however limited) of the sovereign. Rather he was one physically present, *in invitum*, unable to depart voluntarily, and yet

incapable of being expelled because of physical limitations imposed by hostilities.

### 3. *"Residence" In General Naturalization Laws*

For purposes of naturalization under the United States Nationality Code, a person must have "resided" here for the statutory period of five years. 54 Stat. 1142, 8 U. S. C. A. § 707. This has been construed to require that the alien be domiciled here. *United States v. Parisi,* 24 F. Supp. 414, 419 (D. Md., 1938); *Petition of Wright,* 42 F. Supp. 306, 307 (E. D. Mich., 1941); *Petition of Oganesoff,* 20 F. 2d 978, 980 (S. D. Cal., 1927). To acquire such residence, the alien must have entered the United States for "permanent residence." *United States v. Kreticos,* 59 App. D. C. 305, 40 F. 2d 1020 (1930), *passim; International Mercantile Marine Co. v. Elting,* 67 F. 2d 886, 887 (C. A. 2d, 1933). Therefore a temporary visit under 43 Stat. 154, 8 U. S. C. A. § 203(2) (such as respondent was making when he came to the United States in 1939), and *a fortiori* a temporary visit which culminates in a warrant of deportation, does not create the requisite residence. For example, an alien whose status was first that of a temporary visitor and then the wife of a treaty merchant, *In re Pezzi,* 29 F. 2d 999 (S. D. Cal., 1928), and an alien who came as a temporary visitor and overstayed his permit, *In re Wieg,* 30 F. 2d 418 (S. D. Tex., 1929), did not fulfill the residence requirement for naturalization although physically present here for the statutory period. Without the approval of the sovereign, physical presence within the boundaries of the United States cannot constitute "residence," *Kaplan v. Tod,* 267 U. S. 228, 230 (1925).

### 4. *"Residence" In Special Naturalization Laws*

To be eligible for naturalization under the special conditions of the World War II Military Service Act, 56 Stat. 182, 58 Stat. 886, 887, 59 Stat. 658, 8 U. S. C. A.

§ 1001-1002, the alien must have been "at the time of his enlistment or induction a resident [of the United States]." An alien in the United States on a temporary visitor's permit or one subject to a warrant of deportation clearly is not a "resident" within the meaning of this statute. *Ex parte Fillibertie*, 62 F. Supp. 744, 747-748 (E. D. S. C., 1945).[28]

An interpretation which attributes to Congress the use of "resident" and "residing" in contradictory senses, so that permanent residence is required to qualify for privileges incident to military service, while mere physical presence makes the alien subject to the burdens of military service, is too repugnant to elementary concepts of justice for serious consideration.

5. *"Residence" In Decisions Under Various Other Laws*

Furthermore, there was lacking, from the time of respondent's arrival in the United States, until long after the time he filed Form DSS 301 on March 30, 1942, the element of freedom of choice to remain indefinitely which is necessary to constitute "residence". *Neuberger v. United States*, 13 F. 2d 541, 542 (C. A. 2d, 1926); cf. *Matter of Blankford*, 241 N. Y. 180, 149 N. E. 415 (1925); *Harris v. Harris*, 205 Iowa 108, 215 N. W. 661 (1927). Respondent was present here only because the war had made return to his own country impossible.

In *Florica Constantinescu v. Commissioner*, 11 Tax Ct. 36 (1948), an alien similarly situated was held not to be a "resident" for purposes of taxation. In that case, the petitioner, a Roumanian citizen residing in France, had

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[28] Petitioners' assurances—"If [respondent] had wished, as he now declares, to become a citizen of the United States, he could have achieved that ambition most expeditiously by submitting to induction into the armed forces of this country." (Pet. Br. 79)—are indeed hard to reconcile with the *Fillibertie* case.

originally been admitted to the United States in 1939 under a temporary visitor's visa. During the entire taxable year involved, she was under a deportation order which could not be executed because of war conditions. It was held that her physical presence was not sufficient, under those circumstances, to constitute residence.[29] It should be noted that allegiance owed to the *protecting* sovereign is the foundation of the duty to render military service and the duty to pay taxes. To hold that mere physical presence, wholly apart from free choice, is controlling in determining such fundamental obligations, would be to make men mere robots owing duties to whatever force could be brought to bear upon them.[30] Thus petitioners argue, in effect, that the thoroughly established principle of justice which recognizes the correlation between duty owed, and protection granted, was cast aside by Congress, without, as we next see, the slightest discussion of the extent of the change involved. The repugnancy of such a suggestion is obvious.

### C. Nothing in the Legislative History of Section 3 (a)'s Amendment Suggests That Congress Intended to Abandon the Established Meaning of "Residing in the United States."

As already noted, Section 3 (a) as originally enacted required military service only of male citizens and "every male alien residing in the United States who has declared his intention to become a citizen." The "Pearl Harbor"

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[29] Similarly persons caught in foreign countries by the course of war have been held not to be resident therein. *McGrath v. Zander*, 85 U. S. App. D. C. 334, 177 F. 2d 649 (1949); *Stadtmuller v. Miller*, 11 F. 2d 732 (C. A. 2d, 1926).

[30] History tells us that the War of 1812 resulted in part from Great Britain's policy of impressing American seamen (who no longer received any protection from the Crown) into service on British men-of-war, on the then-current theory of "once an Englishman, always an Englishman."

Amendment of Section 3 (a), December 20, 1941, changed this to require military service of male citizens and "every other male person residing in the United States."

There is not one word in the legislative history of that amendment indicating a departure by Congress from the well-settled meaning of the words "residing in the United States." Nor can any implication be fairly drawn that the phrase "residing in the United States" in the amendment is equivalent to "being within the United States." It is true that on October 11, 1940, the then Attorney General rendered an opinion to the effect that the words "every male alien residing in the United States", *as employed in Section 2, STSA*, required every alien within the prescribed age limits, who lived or had a place of residence or abode in the United States temporarily or otherwise and for whatever purpose taken or established to present himself for registration under Section 2 (a). 39 Ops. Att'y Gen. 504. Of course, this opinion was limited to the obligation to register. § 2, STSA. It was not concerned at all with the obligation for military training and service. § 3 (a), STSA. Furthermore, no authority was cited and the conclusions were stated in only one brief paragraph.[31]

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[31] The administrative convenience of this interpretation, and its desirability from the point of view of insuring that all manpower subject to the further obligation of military service would be registered with the Selective Service Boards is so obvious as to need no elucidation. But at the same time it is clear that the very reason that the interpretation of the Attorney General appears not to have been questioned in Congress or elsewhere was the triviality of the obligation it imposed. Aliens visiting only for brief periods of time are not surprised at requirements that they make their whereabouts known to authorities. But military service is a further obligation, far from trivial in its nature, and for that very reason common sense repels the conclusion that Congress without discussion of any kind was imposing it upon noncitizens involuntarily and temporarily within our midst.

There is no justification for contending that Congress, when it enacted the amendment of December 20, 1941, extending the obligation for training and service to non-citizens even though not declarant, adopted the Attorney General's interpretation of those words made solely for the purpose of fixing the obligation to register. Nothing indicates that the opinion of the Attorney General was ever called to the attention of Congress. Nor was there any evidence Congress believed that it was changing the previous policy of drafting only *resident declarant aliens,* to the extent of drafting even those persons *only casually within the country* and not "residing in the United States" in any realistic sense of the words.

The December 20, 1941 amendment to STSA was derived from companion (but not identical) bills introduced in the 77th Congress, 1st Session, on December 15, 1941. S. 2126; H. R. 6215. There are only two brief statements by the Committees concerned giving any indication of the meaning of the amendment to § 3 (a)

(i) The first is the Report of the Senate Committee on Military Affairs, December 16, 1941. Speaking of the amendment to § 3 (a), the Report says:

> "2. Several changes are made with respect to the liability of aliens. Under present law, aliens are liable only if they have declared their intention to become citizens of the United States. Under the bill reported by the committee, aliens would be liable whether or not they had declared their intention to become citizens. However, aliens who are citizens or subjects of a neutral country would be relieved of liability upon making application in the manner prescribed by the President, but the making of such application will debar them from ever becoming citizens of the United States. It is provided that enemy aliens shall not be inducted unless they are acceptable to the land or naval forces.

> "3. Liability for service would be extended to certain persons *resident* in the United States who are nationals of the United States but are not citizens thereof, as is the case of some citizens of insular possessions. * * *" (Emphasis added; Sen. Rep. No. 915, 77th Cong., 1st Sess., 87 Cong. Rec. p. 9905, December 17, 1941.)

It will be noted that in the foregoing there is not the least insinuation that Congress was extending Section 3 (a)'s coverage any more broadly than to include non-declarant *resident* aliens, and *resident* nationals. If Congress had intended by the amendment to include mere sojourners, surely something to that effect would be mentioned. Certainly Section 3 (a) before the amendment did not include sojourners; if the amendment had been intended to include them, such would have been a much more drastic change than including resident non-declarants and resident nationals, and accordingly much more worthy of comment. Yet the only comment, in respect of extension of coverage, pertains to such non-declarants and nationals.

(ii) The second relevant statement is in the Conference Report of December 19, 1941. The conference, like most of the debate, had been concerned primarily with the reduction of the minimum age limit for liability to service and training, which eventually was set at 20 years. However, the Report has the following to say about the amendment of § 3 (a):

> "1. The House bill provided that, within the prescribed age limits, the requirements as to registration and the liability for military service should extend to every male citizen and to every male alien and every noncitizen national of the United States *residing* in the United States. The corresponding provisions of the Senate amendment extended such requirement and liability, within the prescribed age limits, to every male citizen and every male person

> *residing* within the United States. There is no substantial difference between the effect of the House language and the effect of the Senate language. The conference agreement adopts the Senate language." (Emphasis added; H. Rep. No. 1554, 77th Cong., 1st Sess., 87 Cong. Rec., p. 10055, December 19, 1941.)

This, likewise, shows no intention in Congress of using the word "residing" other than in its established meaning; certainly no intention that thereafter it would include a temporary sojourner subject to deportation.

The only case cited by petitioners as holding that a "temporary visitor" is "residing in the United States" within the meaning of Section 3 (a) is *Benzian v. Godwin*, 168 F. 2d 952 (C. A. 2, 1948), cert. denied 335 U. S. 886.[32] That case is clearly distinguishable from the case at bar, because no order of deportation had been issued, the alien having received repeated extensions of his temporary visitor's visa. Furthermore, Benzian was clearly a "citizen or subject of a neutral country", Sweden, while respondent, as we show in III, *infra*, was not.

The sole basis for the *Benzian* decision was that in enacting the amendment of December 20, 1941, which fixed the obligation of *military service* (Section 3 (a)), Congress adopted the interpretation made by the Attorney General fourteen months earlier in connection with the obligation of *registration* (Section 2). Thus the *Benzian* decision relied upon the theory that reenactment of an administratively interpreted statute evidences an intention

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[32] The *Benzian* case is not in any event a binding precedent, for it had abated prior to its decision by the court of appeals because the Selective Service Board, as members of which the defendants were sued, had passed out of existence. *Leader v. Apex Hosiery Co.*, 108 F. 2d 71, 81 (C. A. 3rd, 1939), affirmed, 310 U. S. 469. It was on the ground that the cause had abated that the Solicitor General moved to dismiss the petition for certiorari. *Benzian v. Godwin*, No. 317, October Term 1948, Motion of Solicitor General to Dismiss the Petition for Writ of Certiorari and Memorandum in Support Thereof.

of the legislature to adopt the administrative interpretation. This theory the court applied even though the context of the language reenacted was wholly different from the context of the language interpreted by the Attorney General, the reenactment was unaccompanied by any indication of any sort that Congress knew about the administrative interpretation or gave it any weight in its deliberations, and the result produced was in literal conflict with generations of precedents. Such a formalistic application of the treacherous doctrine of legislative adoption by reenactment is, of course, inconsistent with the decisions of this Court. Here there was no long series of administrative interpretations over a period of several years,[33] but rather a single interpretation, comparatively recent and obscure, and certainly not known to have been called to Congress' attention at the time of reenactment. To accept the reenactment as determinative of the legislative intent under such circumstances is at variance with the decision of this Court in *Girouard v. United States*, 328 U. S. 61, 69-70 (1946), in which this Court refused to accept as binding the failure of Congress to reverse a previous construction made by this Court, even though *six different Congresses* had considered and rejected bills designed to change that construction. See also the concurring opinion of Mr. Justice Rutledge in *Cleveland v. United States*, 329 U. S. 14, 22-24 (1946); cf. *United States v. American Trucking Assns*, 310 U. S. 534, 549-550 (1940), where it affirmatively appeared that the basic administrative interpretation had been called to the attention of Congress.

We believe it most unlikely that Congress merely by using the same words, "residing in the United States",

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[33] It is noteworthy that the three cases of approval by reenactment relied upon by the Court of Appeals for the Second Circuit, involved repeated administrative interpretations over periods ranging from 9 to 20 years: *Lang v. Commissioner*, 304 U. S. 264, 270 (1938 [20 years]; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115 (1939) [19 years]; *Helvering v. Bliss*, 293 U. S. 144, 151 (1934) [9 years]. See 168 F. 2d 952, 956, note 10.

as had been employed in Section 2, was changing its policy with respect to drafting aliens so as not only to reach *resident* non-declarant aliens and nationals, but also to reach all persons whatsoever even those only casually within the United States, *without in any way discussing the radical change involved. Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. 2d 785, 791 (C. A. 2d, 1946), affirmed 328 U. S. 275.

We submit there is *nothing* in the legislative history to justify the conclusion that Congress had so unreasonable a purpose as to subject a sojourner under a warrant of deportation to regular military duty.

Clearly, respondent was not "residing in the United States"; Section 3 (a)'s proviso for debarment from citizenship is not applicable to him and he is not ineligible for naturalization on account of it; and an interpretation to the contrary is an error of law.[34]

[34] Petitioners now argue that respondent should have obtained administrative determination of non-residence pursuant to regulations promulgated under STSA, §5 (a) (Pet. Br. 73-74). The applicable provision of §5 (a) authorized the President to specify categories of persons "residing in the United States" who would be exempt from military service. Thus this provision of §5 (a) was limited by its terms, as was §3 (a), to persons "residing in the United States" which, as we have seen, excluded respondent. The regulations are therefore irrelevant here because respondent, by statutory definition, was outside of their reach. Respondent had entered the United States in August, 1939, and none of these regulations was issued prior to February 7, 1942. 32 CFR (1st Ed. Cum. Supp. for period June 2, 1938 to June 1, 1943), §611.21, p. 9122, effective January 29, 1943, authorized an application for determination of residence by an alien within three months after his entry into the United States. It contained no authorization whatever for an application by an alien who had entered the

## III

## DENMARK, OF WHICH RESPONDENT WAS "CITIZEN OR SUBJECT" WAS NOT A "NEUTRAL COUNTRY," AND THEREFORE THE FILING OF THE CLAIM FOR EXEMPTION WAS A NULLITY.

The claim for exemption, Form DSS 301, which respondent filed on or about March 30, 1942, was a nullity because Denmark was not a "neutral country" within the meaning

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United States more than three months prior to its promulgation. It was not until June 27, 1945 that an amendment to §611.21 was promulgated, §611.21-1, 32 CFR (1945 Supp.), p. 3172, permitting the filing, at any time, of an application for determination of residence for "transmittal to the Director of Selective Service for consideration." Thus it is undisputed that from January 29, 1943, until June 27, 1945, there was no administrative regulation whatsoever under which respondent could have obtained ascertainment of non-residence. However, petitioners for the first time now claim that under §611.21, as originally effective March 16, 1942, 7 Fed. Reg. p. 2084, respondent could have applied for a determination of non-residence up to May 16, 1942. So far as respondent can find after diligent search, §611.21 as effective March 16, 1942, was never printed in CFR but only in Fed. Reg. It will be recalled that it was on March 26, 1942 that respondent's Selective Service Board sent him Form DSS 301, which was filed March 30, 1942. Petitioners' contention assumes that such filing did not cut off the right to obtain an administrative determination of non-residence. The total failure of the regulations to provide norms or standards for ascertainment of residence has resulted in their condemnation as arbitrary and capricious and violative of due process. *Ex parte Asit Ranjan Ghosh*, 58 F. Supp. 851, 853-855 (S. D. Cal., 1944), appeal dismissed, 148 F. 2d 822 (C. A. 9th, 1945). Further, respondent's status as a deportee having been duly fixed on May 15, 1941 by the Immigration and Naturalization officials by issuance against him of a warrant of deportation, it seems clear that no other agency of the Government simultaneously could determine an inconsistent status. As the thought was expressed by the District Court in *Ex parte Asit Ranjan Ghosh, supra*, at 58 F. Supp. 854, "* * * I do not think it is within the contemplation of our system that a man should be fish before one department and fowl before another." For this reason, as well as the reason that respondent's non-residence conclusively appears as a matter of law, an administrative ruling that he was a resident would, in any event, not have been legally sustainable.

of the STSA, Section 3 (a).[35] This contention was argued but not passed upon by the Court of Appeals, because the case was decided in respondent's favor on other grounds (Op. R. 19, n. 6). However, respondent believes that it furnishes an adequate independent basis for affirming the decision below.

In refusing to deny citizenship to a Palestinian subject who had filed Form DSS 301 as a "neutral" alien, the court in *Petition of Ajlouny*, 77 F. Supp. 327 (E. D. Mich. 1948), rejected in the following words the contention that the petitioner had forfeited his eligibility for citizenship:

> "In determining the applicability of [Sec. 3 (a)] to the case of the petitioner, it should be pointed out that it specifically applies to a 'citizen or subject of a neutral country.' Was Palestine in fact a neutral country? The action of the Director of Selective Service in listing it as such did not make it so. It was governed by Great Britain as the mandatory power, and Great Britain was at war long before the registration of the petitioner with his Selective Service Board. * * * It follows therefore, that the petitioner's claim for exemption as a citizen of a neutral country was a nullity and without legal effect, since he was not in fact a citizen of such a country and the section could have no application in his case." (77 F. Supp. at 329-330).

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[35] The section involved reads, in part, as follows: "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That *any citizen or subject of a neutral country* shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * *" December 20, 1941, 55 Stat. 845, 50 U. S. C. A. §303 (a). (Emphasis added.)

Likewise, in the case at bar, respondent's filing of Form DSS 301 was a nullity because he was not the subject of a neutral country. That the claim of exemption would have no effect at all if the registrant was not in fact a citizen or subject of a neutral country is plain from the Selective Service Director's Local Board Memorandum No. 112, dated March 16, 1942, par. 5 (d): "Unless a registrant is a citizen or subject of a neutral country, the filing of an Application by Alien for Relief from Military Service (Form 301) has no effect whatever." (The fact that respondent's Selective Service Board left him in Classification 1-A, available for immediate service, from April 30, 1942 until September 21, 1943, when he was placed in Classification 4-A, past the age of service (R. 4), suggests that the Board itself regarded his Form DSS 301 as ineffectual.)

No conclusive determination of Denmark's status as enemy, cobelligerent, or neutral during the relevant period of World War II has been made by the United States Government. On April 14, 1941, the State Department, apparently with Presidential confirmation, issued a statement that Denmark "can only be regarded as a government which is patently acting under duress and which is in no sense a free agent." In Military Government Law No. 3, Office of Military Government for Germany (U. S.), Title 23, enacted November 15, 1944, Denmark was included in the list of "* * * nations which are signatories of the United Nations Declaration dated January 1, 1942 and nations associated with them in this war * * *." On the other hand, an *ex parte* determination that Denmark was a neutral was made by the Selective Service Director on March 16, 1942, Local Board Memorandum No. 112, and that determination remained unchanged throughout the war (Pet. Br. 64, n. 28). It is submitted that the latter determination was inconsistent with the authoritative decision of the executive branch, and unsupported by the facts. Consequently it cannot govern this case.

During World War II, there never was a Danish government-in-exile. The existing government represented by King Christian X and the Danish Cabinet remained in the homeland, and cooperated with Germany from the occupation on April 9, 1940 to the end of 1942, and perhaps until August 29, 1943.[36] On the other hand, there were certain official and unofficial elements of the Danish Government scattered throughout the world, which cooperated with the United States to the fullest possible extent. These were particularly Henrik de Kauffmann, Danish Minister to the United States, and the Danish Freedom Council in London. The United States Government accorded complete recognition to Kauffmann and executed agreements with him, acting on behalf of the Danish people and their King, which were vital to our war effort.

On account of these circumstances, as the absence of an authoritative determination by the United States Government indicates, the status of Denmark during World War II was at best equivocal. It is hard to tell whether Denmark was allied with our enemy Germany or cobelligerent with us, but it is certain that she was *not* neutral.[37]

In order to show this, little is needed but a skeleton statement of the history of Denmark from 1940 to 1945.[38]

1. On April 9, 1940, the German Army occupied Denmark and Norway (4/9/40, p. 1, col. 8). On the same day,

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[36] See *United States v. Insurance Co. of North America*, 143 F. 2d 53, 54 (C. A. 4th, 1944).

[37] Of course, nationals of Denmark were enemy aliens within the meaning of the Trading with the Enemy Act. *The Rita Maersk*, 52 F. Supp. 56 (D. Mass. 1943), affirmed 144 F. 2d 921; Exec. Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400.

[38] The salient points related here are subject to judicial notice. The references, for convenience sake, are limited unless otherwise noted, to the New York Times, Late City Edition, for the dates indicated, but the vast bulk of the history is available in countless other contemporary newspapers, periodicals, and historical accounts.

Premier Stauning and King Christian of Denmark asked the Danish army and the public to accept the occupation calmly, as *fait accompli*. The German Army of Occupation on the same day issued currency and other regulations in Denmark (4/10/40, p. 4, col. 2). The Danish Minister to the United States, Henrik de Kauffmann, stated that he would refuse to recognize German orders asserting control over Denmark (4/10/40, p. 12, col. 4). April 10, 1940, Premier Stauning announced that his government would remain in office (4/11/40, p. 5, col. 6-7). On that day, the President of the United States issued regulations cutting off commercial intercourse with Denmark (Exec. Order #8389, 5 Fed. Reg. 1400). April 11, 1940, German General Leonhard Kaupisch, head of the army of occupation, announced that Denmark would remain a sovereign state and with that understanding King Christian had agreed to cooperate with the German authorities (4/12/40), p. 10, col. 2). April 12, 1940, Premier Stauning advised the Danish people that the Danish army had decided to acquiesce in the occupation in obedience to the decision of King Christian and the Danish cabinet (4/13/40, p. 4, col. 4). April 15, 1940, a German order was issued controlling employment in Denmark and imposing other restrictions. Premier Stauning urged the Danish people to accept these and other regulations (4/16/40, p. 7, col. 6).

2. April 25, 1940, the President of the United States recognized that a state of war existed between Norway and Germany (Exec. Order #2398, 5 Fed. Reg. 1569). [Please note that Norway and Denmark had been invaded at the same time, and that the former had resisted, but the latter had not.]

3. July 8, 1940, King Christian of Denmark approved a new coalition cabinet. Premier Stauning remained, but Eric Scaevenius, a pro-German, replaced Dr. P. R. Munch as Foreign Minister (7/9/40, p. 10, col. 5).

4. July 24, 1940 and December 2, 1940, the British bombed Danish soil (7/24/40, p. 2, col. 3; 12/2/40, p. 2, col. 4; 12/3/40, p. 3, col. 2).

5. August 16, 1940, Danish youths were jailed for molesting Germans. Premier Stauning issued a warning to the people to remain loyal to Germany (8/16/40, p. 5, col. 2).

6. February 9, 1941, Denmark surrendered ten torpedo boats to Germany (2/9/41, p. 16, col. 1). March 11, 1942, Danish hospitals were requisitioned for German wounded and Danish workers were sent to Germany (3/12/42, p. 13, col. 7).

7. April 12, 1940, Great Britain began seizing Danish ships as enemy property (4/13/40, p. 6, col. 4); February 15, 1941, Chile seized three Danish ships (2/16/41, p. 20, col. 3); March 16, 1941, Peru seized a Danish freighter (3/16/41, p. 19, col. 7); April 6, 1941, Uruguay seized two Danish ships (4/6/41, p. 19, col. 1).

8. April 10, 1941, the President of the United States announced that the United States was taking possession of Greenland, and that an agreement to that effect had been signed between Secretary of State Hull on behalf of the United States and Danish Minister to the United States Kauffmann on behalf of the Danish King (4/11/41, p. 1, col. 8). The State Department announced, in this connection, "so long as Denmark remains under German occupation the Government in Denmark cannot exercise the Danish sovereign powers over Greenland and the agreement, therefore, was signed in Washington." April 12, 1941, the Danish Foreign Office declared the agreement void and recalled Kauffmann (4/13/41, p. 1, col. 5). April 14, 1941, the United States stated that it would ignore the recall, explaining, through a State Department announcement, that:

"* * * the Government of the United States has consistently held since April 9, 1940, and now holds, that the Government of Denmark can only be regarded as a government which is patently acting under duress and which is in no sense a free agent." (4/15/41, p. 8, col. 2).

April 16, 1941, Kauffmann was removed from his office by royal resolution but remained at his post in the United States (4/17/41, p. 12, col. 6).

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9. January 4, 1942, Danish Minister to the United States Kauffmann declined the President's invitation to sign the United Nations Declaration of January 1, 1942 (1/3/42, p. 1, col. 1), stating that he could not sign for Denmark because Denmark was under German duress, but that he pledged the best efforts of the free Danes scattered around the world (1/4/42, p. 36, col. 2). This United Nations Declaration was the reaffirmation of the so-called "Atlantic Charter." January 6, 1942, the Danish Freedom Council in London adhered to the United Nations Declaration (1/7/42, p. 8, col. 6).

10. May 14, 1942, J. Christmas Moller, former Cabinet minister and later Danish Foreign Minister after the Liberation, arrived in England after escape from Denmark; he said the Danish army was still being allowed to call up 3,000 men per year although they normally called more than twice as many (5/15/42, p. 11, col. 2). May 26, 1942, Danish consuls in Australia were dismissed by the Copenhagen Government for refusal to sever relations with the Danish Freedom Council in London, but Australia continued to recognize them (5/26/42, p. 4, col. 7).

11. Beginning September 26, 1942, German-Danish relations were severed for about one week following estrangement resulting from King Christian's curt reply to Hitler's birthday greetings (10/6/42, p. 6, col. 5). November 7, 1942, the Danish government yielded to German pressure, Buhl offering the resignation of the Cabinet. King Chris-

tian asked the pro-German Foreign Minister Eric Scaevenius to form a new government (11/10/42, p. 8, col. 5).

12. August, 1943, unrest was growing steadily among the Danish people (8/18/43, p. 4, col. 1). The United States and her cobelligerents had made landings in the Mediterranean and the U. S. S. R. was repelling the German attack (North Africa, 11/8/42, p. 1, col. 8; Orel, 8/5/43, p. 1, col. 8).

13. August 29, 1943, open resistance to the Germans began. The Danish people scuttled part of the Danish navy. The German occupation forces deposed the Danish government (8/29/43, p. 1, col. 6; 8/30/43, p. 1, col. 8) [August 29, 1943 is the date from which Danish authorities later stated the cobelligerency of Denmark began. See par. 15, *infra.*] August 30, 1943, Premier Scaevenius and Cabinet resigned (8/31/43, p. 1, col. 5). September 1, 1943, Kauffmann and Moller stated that a government in exile was not to be expected and was undesirable (9/1/43, p. 6, col. 4; 9/2/43, p. 4, col. 2). [It is plain from this that both Kauffmann and Moller considered that the government which had collaborated with the Germans at least up to the end of 1942 was the established Danish government.] Secretary of State Hull announced September 3, 1943 that the United States would continue to deal with Kauffmann (9/3/43, p. 3, col. 2).

14. May, 1945, Denmark was liberated by advancing British and American troops (5/4/45, p. 1; 5/5/45, p. 1, col. 8). May 9, 1945, Premier Vilhelm Buhl of the restored Danish government asserted that it was Denmark's wish to join the United Nations and cancel the Anti-Comintern Pact (5/10/45, p. 2, col. 6). [Denmark had entered into the Anti-Comintern Pact with Germany in 1939 and had never withdrawn from it, consequently it seems that the established Danish government was technically cobelligerent with Germany against the U. S. S. R. which during that period was cobelligerent with the United States.]

15. May 21, 1945, Foreign Minister J. Christmas Moller of Denmark made a speech, reading in part as follows:

> "From various quarters I have been asked how Denmark's position today could best be explained, and I believe that I am correct in saying that the Danish Government and the Danish people are of the opinion that they were at war with Germany for many months, nay, for several half-years. What happened, especially on August 29th [undoubtedly referring to August 29, 1943, par. 13, *supra*], was in my opinion, Occupied Denmark's declaration of war to Germany and the Danish Government and the Danish Parliament have sanctioned this line of policy in all respects. * * *" (Records at Danish Embassy in custody of Adam Moltke-Huitfeldt, Secretary).

From the above history, it is plain that Denmark's status was—even in the eyes of our executive department and its subordinate agencies—ambiguous, depending upon which of the operating Danish governmental forces were considered.

It appears that the established Danish Government in the homeland, as represented by the King and Cabinet, was an ally, or pseudo-ally, either willing or unwilling, of our enemy Germany from April 9, 1940 until the end of 1942 and perhaps as late as August 29, 1943. At any rate, Denmark's officials make no claim of having been cobelligerent with the United States until the latter date. Furthermore, Denmark's participation in the Anti-Comintern Pact from 1939 through the end of active hostilities indicates that formally at least Denmark was an ally of our enemy Germany during the entire war. *Sundell v. Lotmar Corp.*, 44 F. Supp. 816 (S. D. N. Y. 1942).

Conversely, from the recognition accorded by the United States to the external agents of the Danish people—notably Minister to the United States Kauffmann and the Danish Freedom Council in London—it would seem that Denmark was regarded as a cobelligerent with the United States

from the very beginning. Kauffmann entered into an agreement authorizing the United States to take possession of Greenland on April 10, 1941, even before we were at war with Germany—action typical of the energy with which the free Danes throughout the world were prosecuting their resistance to the German forces (par. 8, *supra*). And the United States continued its recognition of Kauffmann, even after his recall, because the State Department realized the duress under which the home government acted. This realization was further exemplified by the invitation of the President to Kauffmann to sign the United Nations Declaration on January 4, 1942 (par. 9, *supra*).

The contention made by petitioners that the status of Denmark is a political question which may not be considered here (Pet. Br. 64, n. 28) is without merit. Even though the determination of neutrality is the type of matter usually left for the political branches of the government (cf. Ex parte *Cooper*, 143 U. S. 472, 503 (1892); *Republic of Mexico v. Hoffman*, 324 U. S. 30, 34-35 (1945)) it is necessary that courts interpret the pronouncements of those branches in order to determine what the political judgment was. *The Three Friends*, 166 U. S. 1, 63, 70-71 (1897). And of course such interpretation must be made with greatest care when the political determinations of the subordinate executive agencies, in light of the circumstances, are conflicting. *Connell v. Vermilya-Brown Co.*, 164 F. 2d 924, 927-928 (C. A. 2d, 1947), affirmed 335 U. S. 377, 380. When the interest at stake is as weighty as that of respondent—his eligibility for citizenship possibly for all time—the debarment claimed should be established with exactitude. *Tutun v. United States*, 270 U. S. 568, 578 (1926).

The most authoritative pronouncement on Denmark's status was that of the State Department, April 14, 1941, obviously concurred in by the President, that "* * * the Government of Denmark can only be regarded as a gov-

ernment which is patently acting under duress and which is in no sense a free agent" (par. 8, *supra*). This determination was the basis for the continued recognition of Kauffmann, and was renewed January 1, 1942 (par. 9, *supra*) and again September 3, 1943 (par. 13, *supra*).

Shortly after the above-quoted statement, another executive agency, the Director of Selective Service, issued a memorandum listing Denmark as a neutral country, Local Board Memorandum No. 112, March 16, 1942.[39] This opinion was rendered at a time during which the President and the State Department clearly considered Denmark a tool of Germany, and "in no sense a free agent." It is scarcely possible to perceive how the Director's opinion can stand as a political decision conclusive on the courts—adverse as it was to the President's own determination.[40]

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[39] The basis for that determination was stated by the Director of Selective Service in a letter addressed to Representative Arthur G. Klein, dated December 9, 1948, as follows:

> "Since it was not believed that Denmark should be considered an enemy country and since it was not actively engaged in fighting our enemies and therefore could not be considered as cobelligerent, it was classified for our purposes as a neutral country. This determination was approved by the Department of State."

Despite the last sentence of the above statement, the State Department, in a letter dated November 29, 1948, from Florence Kirlin, Special Assistant to the Counselor, State Department, to Representative Arthur G. Klein, disavowed having made any determination of Denmark's status beyond the statement that Denmark was "a government which is patently acting under duress and which is in no sense a free agent."

[40] In *The Three Friends*, 166 U. S. 1, 70 (1897), although the majority disagreed with Mr. Justice Harlan as to the meaning of the words "colony, district, or people" in the Neutrality Act, there seems to have been no quarrel with his observation that: "The United States cannot be said to be 'at peace', or not 'at peace', with insurgents who have no government except 'on paper', no power of administration, and are merely nomads [as President Cleveland had said]."

Still later, on November 15, 1944, while this Selective Service determination that Denmark was neutral remained on the books, the Office of Military Government for Germany (U. S.), another executive agency, listed Denmark as a cobelligerent. Military Government Law No. 3, Title 23.[41]

The judicial self-limitation represented by the rule that courts will not normally decide political questions is based in large part on the necessity for unity of action in foreign affairs. *Curtiss-Wright Corp. v. United States*, 299 U. S. 304, 319 (1936). However, when the political decisions emitted by executive agencies are so diverse, then there is strong reason for the courts to adhere to the most authoritative—that of the President and the State Department[42]—and to refuse to look to a contrary decision of a subordinate agency, especially when that opinion has no support in the circumstances.[43]

Nor is there any force whatsoever to the suggestion of petitioners that respondent should have pursued an administrative remedy. At the time no administrative pro-

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[41] This determination may have been based on either of two factors:

(a) the recognition accorded to Kauffmann as a cobelligerent;
(b) the uprising of August 29, 1943, in the Danish homeland (par. 13, *supra*).

[42] In the matter of exempting neutral aliens from military service, inextricably linked as it is to our relations with other nations, it is uniquely appropriate that the State Department be the "arm of the President" to determine what countries are "neutral".

[43] Just as *ex parte* administrative interpretations are accorded less weight than *inter partes* decisions, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 290 (1946), so also are interpretations of an agency expert in the field of international relations entitled to greater weight on such an issue as neutrality. Cf. *United States v. American Trucking Ass'ns*, 310 U. S. 534, 549 (1940).

cedure was available for such an inquiry. Since no earlier opportunity was open, respondent may, of course, raise the issue in this action.

We have shown that Section 3(a) is inapplicable to respondent by virtue of its own literal provisions.[44] But

[44] Affirmance of the decision below on the substantive issue is also required for an additional reason, argued in the court below but not discussed in the opinion, of which brief statement will suffice. Section 3(a), STSA, on which the administrative officials predicated their conclusion of ineligibility for citizenship, had expired March 31, 1947. Section 16(b), STSA, as amended, provides:

> "The provisions of the third sentence of section 3(a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3(b), 3(c), 3(d), 8 and 16(b), and the fourth and fifth provisos of the second sentence of section 3(a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." 54 Stat. 897, 59 Stat. 166, 60 Stat. 181, 342, 50 U. S. C. A. App. §316(b).

Thus by §16(b), certain portions of the Act were saved from the general termination, but the portion of §3(a) debarring from citizenship certain aliens who filed Form DSS 301 was allowed to expire, and so was blotted out as if it had never existed. *United States v. Tynen*, 11 Wall. 88, 95 (U. S. 1871); *Ewell v. Daggs*, 108 U. S. 143, 150 (1883). Although §3(a) had thus lost any possible debarring effect in relation to respondent on March 31, 1947, the administrative orders in this case were issued long after that date, on June 27, 1947, and November 10, 1947 (R. 3).

It is true that the amendment of §28(c) of the Immigration Act of 1924, enacted October 29, 1945, 59 Stat. 551, was relied on in *Benzian v. Godwin*, 168 F. 2d 952, 956 (C. A. 2d, 1948), *supra* at p. 43, as indicating Congress' intention to continue the effective-

apart from its inapplicability for these reasons, we believe that the facts here made clear that Congress *could not* have intended the debarment from citizenship of one in respondent's position. In other words, we believe that the *reason* behind the statute accords with the interpretation necessitated by the language we have discussed. True, Section 3(a) provides that an alien "residing in the United States", who is the "citizen or subject of a neutral country" shall be debarred from citizenship if he makes application to be relieved from military service, without further qualification. But the law is replete with instances where literal phraseology necessarily gives way to the true intention and purpose of the statute. Thus, this Court found it necessary to introduce the "rule of reason" into the blanket language of the Sherman Act, *Standard Oil Company v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Company*, 221 U. S. 106 (1911). In *Hecht Co. v. Bowles*, 321 U. S. 321

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ness of §3(a)'s provisions for debarment from citizenship. The amendment reads:

> "(c) The term 'ineligible to citizenship', when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 3(a) of [STSA], as amended * * * or under any law amendatory of, supplementary to, or in substitution for, any such sections;"

This amendment to §28(c) thus merely incorporates §3(a) (subject to the termination provisions of §16(b)) by reference. Perpetuation of §3(a) beyond its termination date is in no way implied.

[1] 1 U. S. C. A. §109 (R. S. §13, as amended March 22, 1944, and July 30, 1947, 16 Stat. 432, 58 Stat. 118, 61 Stat. 633, 635) does not require a contrary interpretation. By the express exception of provisions not to expire, and particularly by the saving provision "as to offenses committed prior to such date [March 31, 1947]," Congress made plain that this was a case in which "the temporary statute shall so expressly provide", for Congress was itself covering the ground which the general rule of construction (1 U. S. C. A. §109) was intended to guard on occasions when Congress was silent. *Great Northern Ry. Co. v. United States*, 208 U. S. 452, 465 (1908).

(1944), it was held that the provision of section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 33, 58 Stat. 340, 50 U. S. C. A. App. § 925, that upon proper showing an injunction "shall be granted", did not make it mandatory upon the court to issue an injunction, but that the court retained the traditional discretion of equity to grant or withhold an injunction.

A literal interpretation of Section 3(a), devoid of recourse to its true purpose and intent, would produce the absurdity whereby any neutral alien who had ever filed Form DSS 301 would forever be debarred from United States citizenship, even though subsequent to filing it he withdrew it and served voluntarily and heroically in our armed services. We do not believe such a literal application was intended by Congress. What, then, was the purpose of the proviso of Section 3(a) involved?

It seems clear that Congress intended by such proviso to require noncitizens *resident* in the United States to make a rational choice between accepting military service or obtaining relief therefrom, the latter choice to debar them from United States citizenship. As applied to persons who reasonably could make such a choice—and undoubtedly *residents* could—the Congressional purpose was perfectly consistent with this country's fundamental philosophy, that no alien shall be naturalized unless he is attached to the principles of the Constitution of the United States and well disposed to the good order and happiness thereof. Cf. Nationality Code, 54 Stat. 1142, 8 U. S. C. A. § 707(a). Normally an alien resident of this country would not be so attached and disposed if his purpose was to shirk the obligation of defending the country. But this presupposes that the alien had such an obligation and could reasonably be expected to undergo military service.

In this case respondent, a temporary visitor in the country on a sixty-day permit, was caught here by hostilities which prevented his return to Denmark. He was a Danish subject and owed his allegiance to Denmark. It was no fault of his that he was compelled to stay here. Facts are hard things. Respondent found it necessary, in order to live, to accept employment here, thus violating his temporary visitor's status and resulting in a warrant of deportation against him effective May 15, 1941. His status of temporary visitor thus merged into that of a person here not even on sufferance—a person only physically here because it was impossible to expel him. Under such circumstances, it is difficult to see how the filing of Form DSS 301 can have any relevance in connection with respondent's attachment to the principles of our Constitution. There was no choice for him to make. To demand of him military service in the face of the contemplated inevitable ouster of him from the country regardless of service, is to require a standard of loyalty far beyond that which can be expected of anyone. It would be a loyalty that demands all and offers nothing. It is not the kind of loyalty contemplated by a reasonable Congress in enacting Section 3(a).

This is not to minimize the moral reprehensibility of those who had a duty to serve and who shirked it, but to make clear that under the circumstances respondent had no such duty. A claim of relief from an obligation of military service which one does not have, in no way reflects upon his attachment to the principles of our Constitution. *Tutun v. United States*, 12 F. 2d 763 (C. A. 1st, 1926); cf. *Petition of Kohl*, 146 F. 2d, 347 (C. A. 2d, 1945).

## CONCLUSION

The judgment below is correct on both the procedural and substantive questions involved, and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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# No. 34

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J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

*vs.*

PEDER KRISTIAN KRISTENSEN

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ON WRIT OF CERTIORARI

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## BRIEF FOR EINAR RASMUSSEN AND OTHERS, AMICUS CURIAE

---

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## INDEX


| | Page |
|---|---|
| Introduction | 1 |
| Statement | 2 |
| Questions Presented | 3 |
| Summary of Argument | 4 |
| I. The Deportation Statute Does Not Preclude Judicial Review | 4 |
| II. Declaratory Judgment Is Appropriate | 7 |
| 1. General Considerations | 7 |
| 2. A Justiciable Controversy Is Presented | 9 |
| 3. The Issue Is Ripe for Adjudication | 10 |
| 4. Practical Consideration—Prevention of Economic and Social Waste | 12 |
| 5. Irrelevant and Immaterial Considerations | 13 |
| III. Review Is Authorized under the Administrative Procedure Act | 14 |
| IV. Respondent Did Not Incur the Citizenship Bar of 50 U.S.C. App. 303-a and Is Eligible for American Citizenship | 16 |
| V. The Citizenship Bar of 50 U.S.C. App. 303-a is No Longer Operative | 16 |
| Conclusion | 21 |


### CITATIONS

*Cases:*


| | |
|---|---|
| *Alvater* v. *Freeman*, 319 U. S. 359 | 12 |
| *Benzian* v. *Godwin*, 168 F. (2d) 952 | 19 |
| *Camaratta* v. *Miller*, 79 F. Supp. 643 | 7, 15 |
| *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103 | 9 |
| *Delgadillo* v. *Carmichael*, 332 U. S. 388 | 5 |
| *Duke Power Co.* v. *S. C. Tax Comm.*, 81 F. (2d) 513 | 18 |
| *Eagles* v. *Samuels*, 329 U. S. 304 | 5 |
| *Eccles* v. *Peoples Bank*, 333 U. S. 426 | 12 |
| *Eisler* v. *Clark*, 77 F. Supp. 610 | 15 |

| | Page |
|---|---|
| *Estep* v. *United States*, 327 U. S. 114 | 6 |
| *Ewell* v. *Daggs*, 108 U. S. 143 | 18 |
| *Fong Haw Tan* v. *Phelan*, 333 U. S. 6 | 5 |
| *Fong Yue Ting* v. *United States*, 149 U. S. 698 | 4 |
| *Gegow* v. *Uhl*, 239 U. S. 3 | 6 |
| *Gordon* v. *United States*, 117 U. S. 697 | 9 |
| *In re Carlson*, 730—P 259687 (D.C. Ill. 1942) | 17 |
| *In re Martinez*, 73 F. Supp. 101 | 19 |
| *In re Urmenta*, 42 F. Supp. 138 | 17 |
| *Japanese Immigrant Case*, 189 U. S. 86 | 4 |
| *Kessler* v. *Strecker*, 307 U. S. 22 | 5 |
| *Kristensen* v. *McGrath*, 179 F. (2d) 796 | 7, 15 |
| *Lem Moon Sing* v. *United States*, 158 U. S. 538 | 4 |
| *Lloyd Sabaudo Soçieta* v. *Elting*, 287 U. S. 329 | 4 |
| *Ludecke* v. *Watkins*, 335 U. S. 160 | 5 |
| *Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999 | 9 |
| *Ozawa* v. *United States*, 260 U. S. 178 | 10 |
| *Perkins* v. *Elg*, 307 U. S. 325 | 7 |
| *Petition of Ajlouny*, 77 F. Supp. 327 | 16 |
| *Petition of Otness*, 49 F. Supp. 220 | 17 |
| *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 | 7, 15 |
| *Scholnick* v. *Clark*, 81 F. Supp. 298 | 15 |
| *Stark* v. *Wickard*, 321 U. S. 288 | 6 |
| *Sung* v. *McGrath*, 339 U. S. 33 | 5 |
| *The Irresistible*, 7 Wheat. 551 | 17 |
| *U. S. ex rel. Bradley* v. *Watkins*, 163 F. (2d) 328 | 11 |
| *U. S. ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 | 7, 15 |
| *United States* v. *Boisdore*, 8 How. 113 | 17 |
| *United States* v. *Ginsberg*, 243 U. S. 472 | 19 |
| *United States* v. *Hark*, 320 U. S. 531 | 18 |
| *United States* v. *Reisinger*, 128 U. S. 398 | 18 |
| *United States* v. *Sing Tuck*, 194 U. S. 161 | 11 |
| *United States* v. *Thind*, 261 U. S. 204 | 10 |
| *Yamashita* v. *Hinkle*, 260 U. S. 199 | 10 |

*Statutes:*

| | |
|---|---|
| Immigration Act of 1917: | |
| 8 U.S.C. 153 | 6 |
| 8 U.S.C. 155(a) | 6 |
| 8 U.S.C. 155 (c)(1) | 6 |
| 8 U.S.C. 155 (c)(2) | 9 |

Page

8 U.S.C. 180 ..... 10
8 U.S.C. 213(c) ..... 10

Senate Report 1005, 73rd Congress, 2nd Session ..... 12
United States Military Government, Law No. 3 (for Germany), Title 23 ..... 16
1 U.S.C. 109 ..... 19
5 U.S.C. 133 t, Note ..... 10
5 U.S.C. 1009 ..... 14
28 U.S.C. 2201 ..... 7
50 U.S.C. App. 303(a) ..... 16
50 U.S.C. App. 316 ..... 16

*Miscellaneous:*

Borchard, Declaratory Judgments (2nd ed.) 788 ..... 8
Davis, Nonreviewable Administrative Action, 96 U. of Pa. Law Review 749 ..... 4, 6
Duval, Declaratory Actions: Present-Day Uses of a Tested Procedure, 34 American Bar Association Journal 379 ..... 7
Final Report of the Attorney General's Committee on Administrative Procedure ..... 13
House Committee Report 1946, 79th Congress ..... 13, 14
Monthly Review, Immigration and Naturalization Service, November 1947 ..... 17
Orlow, Deportation under the Administrative Procedure Act, 22 Temple Law Quarterly 74 ..... 16
Scanlan, Judicial Review under the Administrative Procedure Act, XXIII, Notre Dame Lawyer, 520 ..... 11, 16
Schwartz, Administrative Finality and the Administrative Procedure Act, XVII, I.C.C. Practitioners Journal 32 ..... 6, 16
Secretary of Labor's Committee on Administrative Procedure, The Immigration and Naturalization Service (1940) ..... 4
Senate Document 248, 79th Congress ..... 13, 14
49 Columbia Law Review 73 ..... 15
61 Harvard Law Review 1445 ..... 16
92 Congressional Record 5654 ..... 15

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1950**

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# No. 34

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J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

*vs.*

PEDER KRISTIAN KRISTENSEN

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ON WRIT OF CERTIORARI

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## BRIEF FOR EINAR RASMUSSEN AND OTHERS, AMICUS CURIAE

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### Introduction

This brief is filed on behalf of Einar Rasmussen and others as *amicus curiae* pursuant to Paragraph 9(2), Rule 27 of the Supreme Court Rules as amended. Written consent of all the parties in interest has been granted.

Counsel herein represent several aliens whose cases have been held in abeyance in the Court of Appeals for the District of Columbia pending the decision of this cause. Einar Rasmussen is one of these cases. Rasmussen is a citizen of Denmark who entered the United States temporar-

ily in 1929 as a seaman. He subsequently married an American citizen and has two American born children, all of whom are dependent upon him for support. On April 26, 1943, Rasmussen claimed exemption under the Selective Service Act of 1940 as a neutral alien. On October 4, 1943, he requested permission to withdraw his exemption claim and submitted himself for induction. He was classified 1A, given a physical examination and rejected because of defective vision. In deportation proceedings in 1944 he was granted permission ~~to go~~ to Canada for the purpose of securing a permanent immigration visa and reentering the United States pursuant thereto. In 1946, he received a permanent immigration visa from an American consul in Canada and our Immigration authorities admitted him to the United States for permanent residence.

In 1947 a second deportation proceeding was instituted on the ground that Rasmussen was ineligible to citizenship under the Selective Service Act of 1940 (50 U.S.C. App. 303a) and that he was therefore improperly admitted for permanent residence in 1946. Deportation to Denmark was directed by the Attorney General. Rasmussen has not been in custody and judicial review has been sought in the District of Columbia in an action for declaratory judgment and review under the Administrative Procedure Act. The issues raised in the *Rasmussen* case are similar to those upon which certiorari has been granted in the instant case. If Rasmussen was eligible for citizenship in 1946 his deportation is improper. If judicial review of the order in a declaratory judgment action is appropriate, judgment may be rendered in the Court of Appeals in Rasmussen's favor.

## Statement

Respondent, a citizen of Denmark, entered the United States as a temporary visitor in 1939. In 1941 he was or-

dered deported on the ground that he overstayed his visit. On March 30, 1942, on the advice of his draft board that he was ineligible to citizenship and would be deported in any event, respondent claimed exemption from the draft as a "neutral" alien. Thereafter respondent married an American citizen. His deportation proceeding was reopened, the deportation order was withdrawn and he was granted voluntary departure. The sole basis for denying more complete relief in the form of suspension of deportation was because of the legal conclusion of the Attorney General that respondent was ineligible to citizenship by reason of his claim of exemption as a neutral alien. The alien was not detained at the time of institution of suit and is not presently detained. The District Court dismissed respondent's complaint and the Circuit Court reversed this determination holding that respondent was eligible for citizenship. 179 F. (2d) 796.

## Questions Presented

1. Whether there may be judicial review of erroneous determinations of law by administrative officials in deportation cases, and if so whether such judicial review may be exercised only in a habeas corpus proceeding.

2. Whether a justiciable issue is presented when an alien is denied discretionary relief in a deportation proceeding upon an erroneous conclusion of law.

3. Whether a citizen of Denmark who claims draft exemption as a neutral alien is barred from citizenship under the Selective Training and Service Act of 1940, 50 U.S.C. App. 303(a).

4. Whether the citizenship bar of the Selective Training and Service Act of 1940 is presently in force.

## Summary of Argument

The deportation statute (8 U. S. C. 155-a) is not interpreted to preclude judicial review of determinations of law. A justiciable issue has been presented appropriate for declaratory judgment. The alien was not a citizen of a neutral country and therefore did not incur the citizenship bar prescribed by the Selective Training and Service Act of 1940 (50 U. S. C. App. 303a) which has, in any event, become inoperative so that respondent is presently eligible for citizenship.

I

## The Deportation Statute Does Not Preclude Judicial Review

The early immigration cases, including *Lem Moon Sing* v. *United States*, 158 U. S. 538 and *Fong Yue Ting* v. *United States*, 149 U. S. 698 (cited in the Government's brief at pp. 25-26) implied, if they did not hold, that even erroneous constructions of the immigration laws were not subject to judicial review. See *The Secretary of Labor's Committee on Administrative Procedure*, The Immigration and Naturalization Service (1940) at p. 42, *et seq.*; *Davis*, Non-reviewable Administrative Action, 96 U. of Pa. Law Review, 749, 763-5.

Beginning in 1903, with the *Japanese Immigrant Case*, 189 U. S. 86, judicial review of deportation orders was firmly established and expanded.[1] Review of deportation orders and its scope as presently recognized was stated in 1932 by Justice Stone, speaking for the court in *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335:

> "The action of the Secretary is, nevertheless, subject to some judicial review, as the court below held.

[1] The use of habeas corpus to review immigration legislation is almost coeval with that legislation. *Freud*, Administrative Power over Persons and Property (1928) p. 241.

> The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams*, 192 U. S. 1, *Gegiow* v. *Uhl*, 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. Compare *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *The Japanese Immigrant Case*, 189 U. S. 86, 100, 101; see *United States ex. Iorio* v. *Day*, 34 F. (2d) 920; *Whitfield* v. *Hanges*, 222 Fed. 745."

This principle was reaffirmed in 1939 in *Kessler* v. *Strecker*, 307 U. S. 22, where Justice Roberts declared:

> "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside."

Deportation orders have been set aside in recent terms of this Court where the Attorney General misconstrued the applicable statute (*Delgadillo* v. *Carmichael*, 332 U. S. 388; *Fong Haw Tan* v. *Phelan*, 333 U. S. 6) or where the deportation hearing was unfair. *Sung* v. *McGrath*, 339 U. S. 33.

It therefore appears that deportation orders are not final in the sense that they are not subject to judicial review. Nor, is habeas corpus limited in deportation cases to its traditional role to ascertain whether the agency had jurisdiction to act as it is in alien enemy removal cases (*Ludecke* v. *Watkins*, 335 U. S. 160) or selective service cases. (*Eagles* v. *Samuels*, 329 U. S. 304).

Respondent has been ordered to depart voluntarily in lieu of deportation [8 U. S. C. 155(c)(1)]. Provision for statutory finality is made applicable only to aliens "ordered deported." Similiar language is not made applicable to orders to depart in lieu of deportation, although the Government argues that there is statutory finality "in alien deportation cases" (Brief, p. 11).

Section 19(a) of the Immigration Act of 1917 [8 U. S. C. 155(a)] provides that where an alien is "ordered deported . . . the decision of the Attorney General shall be final."

Similar language is utilized in the cases of arriving aliens seeking admission to the United States where it is provided that "the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General" (8 U. S. C. 153). In holding this language inapplicable to questions of law, the Supreme Court stated in *Geigow* v. *Uhl*, 239 U. S. 3:

> "The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act".

A similar construction has been given to provisions in the Selective Training and Service Act making draft board orders final. *Estep* v. *United States*, 327 U. S. 114.

Thus, neither the silence of Congress to provide for judicial review nor provisions for finality have been held to preclude judicial review. *Stark* v. *Wickard*, 321 U. S. 288; *Estep* v. *United States, supra; Davis, supra* 96 U. of Pa. Law Rev. 749, 763-5; *Schwartz*, Administrative Finality and the Administrative Procedure Act, XVII, I.C.C. Practitioners Journal 32, 39. Nor, has judicial review in immigration cases been limited to habeas corpus proceedings.[2] *U. S.*

[2] A proposal to limit judicial review in immigration cases to habeas corpus proceedings was contained in S. 1832, 81st Congress. S. 1832 was later incorporated in Public Law 831 but the proposed habeas corpus limitation was omitted.

*ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 (C. A. 3); *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C.A. 3); *Camaratta* v. *Miller*, 79 F. Supp. 643; *Kristensen* v. *McGrath*, 179 F. (2d) 796 (C. A. D. C.).

## II

## Declaratory Judgment is Appropriate

1. *General Considerations.*

Under 28 U. S. C. 2201, in case of actual controversy, except with regard to Federal taxes, any court of the United States, upon filing an appropriate pleading, may declare the rights and other legal relations of any interested party.

The prerequisites for obtaining declaratory relief are: (1) A justiciable controversy; (2) A controversy between adverse parties; (3) A tangible legal interest in the controversy by the party asserting it; (4) An issue ripe for adjudication. *Duvall, Declaratory Actions: Present-Day Uses of a Tested Procedure* (34 American Bar Association Journal (1948) 379).

All four factors noted above exist in the instant case and in a similar situation, Declaratory Judgment has been deemed appropriate. In *Perkins* v. *Elg* (District of Columbia, Equity 63, 408) Judge Bailey held:

> "According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. *Her only recourse would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for which a declaratory judgment is eminently suited.*" (Italics supplied).

The Circuit Court of Appeals for the District of Columbia on review said (99 F. (2d) 408):

> "Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her (plaintiff's) arrest and deportation . . . She has not yet been arrested and therefore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less than property rights—and an actual and vital controversy exists between her and the government in relation to them. *The right to be immune from threats of deportation* and from the declarations of public officials that she is an alien and subject to arrest, *is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit.*"

Upon review by the Supreme Court (307 U. S. 325) it was ruled that:

> "The court below, properly recognized the existence of an actual controversy with the defendants (Aetna Life Ins. Co. *v.* Haworth, 300 U. S. 227) . . . and we think the decree should include the Secretary of State as well as the other defendants."

The issue in this case is one of the eligibility to citizenship rather than citizenship itself. The court below properly applied the principle of the *Elg* case to the controversy here presented. The "construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common question of declaratory action." *Borchard*, Declaratory Judgments (2nd ed. 1941) pp. 788-789. There can be no dispute, that the issues here presented fall into this category of cases.

2. *A Justiciable Controversy is Presented.*

The order herein refuses the grant of suspension of deportation on the ground of ineligibility to citizenship. It is only an affirmative grant of suspension which is subject to Congressional review (8 U. S. C. 155 c-2).

Determination of respondent's status—as one eligible or ineligible to American citizenship will not be an opinion "without the power of pronouncing judgment" as was the case in *Gordon* v. *United States*, 117 U. S. 697. The situation here is unlike that in *Chicago and Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 112 where Justice Jackson said:

> "Until the President acts, there is no final administrative determination to review . . . Until the decision of the Board has Presidential approval, it grants no privileges and denies no rights."

Here, the Attorney General can and does deny rights without Congressional approval or disapproval. Orders to leave the United States and deportation orders are final administrative determinations subject to no Congressional review. The Government inconsistently urges at one and the same time that the administrative order herein is not final or binding to present a justiciable controversy (Point I) and that it is so final and conclusive as to preclude judicial review (Point II).

Review upon writs of habeas corpus of deportation orders denying suspension of deportation has traditionally been considered justiciable as noted by the Government at page 56 of its brief. Such review has even been extended to an arbitrary refusal to exercise discretion granting suspension of deportation. *Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999 (C. A. 2d). Here review is merely sought of an erroneous legal ruling.

Justiciability can hardly be made dependent upon the fact that declaratory judgment is sought here rather than habeas corpus. Determinations of status as an American citizen have been considered justiciable. *Perkins* v. *Elg*, *supra*. Eligibility for such status should likewise be considered proper for judicial determination as it frequently has in naturalization cases. *Ozawa* v. *United States*, 260 U. S. 178; *Yamashita* v. *Hinkle*, 260 U. S. 199; *United States* v. *Thind*, 261 U. S. 204. That the issue arises in a deportation proceeding should not detract from its justiciable character. A judgment that the respondent is an alien eligible for citizenship will be a determination conclusive upon all concerned with that issue. It will of course leave the Attorney General and Congress free to deny or grant suspension as a matter of discretion. That discretion is not the subject of attack herein. The issue herein is an issue of law, of statutory eligibility to citizenship—an issue that has always been cognizable judicially under Article III of the Constitution.

3. *The Issue is Ripe for Adjudication.*

The Attorney General's determination that respondent is ineligible for citizenship is binding upon all agencies of the government. (Reorganization Plan No. V, See: Note to 5 U. S. C. 133 t.) If respondent leaves the United States as directed he will be ineligible to return to the United States for permanent residence [8 U. S. C. 213(c)]. Temporary readmission will be denied to him under present day practices of excluding visitors who have previously indicated a desire to remain here permanently. If he does not depart and he remains in the United States, he will be deported, barred from reentry and subjected to criminal penalties if he attempts to reenter (8 U. S. C. 180).

It would be harsh to require respondent to be taken into

custody as a prerequisite to testing the issue of law here presented even though he has been twice before the Board of Immigration Appeals and exhausted his administrative remedies.[3] If custody is a prerequisite to judicial review and habeas corpus the exclusive remedy, then an American denied the rights of citizenship in a deportation case would under 28 U. S. C. 2201 be required to submit to incarceration before judicial action would be appropriate. Nevertheless in *Perkins* v. *Elg*, *supra* the plaintiff, a citizen, was told by the immigration authorities to leave the United States with a threat of deportation for noncompliance. It was held that the matter was suitable and ripe for declaratory judgment.

The respondent has been ordered to leave the United States. The Government concedes that "a deportation order will probably issue and he will be deported if he does not depart voluntarily" (Brief, p. 22). The situation is identical with that presented in the *Elg* case. No further administrative relief is open to respondent to test his eligibility for citizenship or his eligibility for suspension of deportation. And if further relief were available, nevertheless judicial review of an issue of law requiring no need for determination of an issue of fact would not be premature. *United States* v. *Sing Tuck*, 194 U. S. 161; *U. S. ex rel. Bradley* v. *Watkins*, 163 F. (2d) 328 (C. A. 2).

The issue of law herein, whether respondent is eligible for citizenship and suspension of deportation, is ripe for adjudication.

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[3] If a gap existed between the exhausting of administrative remedies and taking the alien into custody, it has now been closed by 5 U.S.C. 1009(c). *Scanlan*, Judicial Review under the Administrative Procedure Act, XXIII, Notre Dame Lawyer (1948) 520, 521.

4. *Practical Considerations—Prevention of Economic and Social Waste.*

The announced purpose of declaratory judgment procedure was to prevent economic and social waste. (Senate Report 1005, 73rd Congress, 2d Session, p. 3.)

To require an alien to submit to incarceration in order to seek judicial review in a habeas corpus proceeding means that he must leave his wife, his children, his family and his job and spend his time in a local jail or at an immigration detention center like Ellis Island, while his rights are in litigation. The harshness and social waste of such a procedure needs no elaboration. At the same time, the government must utilize funds for the alien's food, for detention quarters and for the services of the alien's custodian—an economic waste, expended to preserve the formalism of habeas corpus but unnecessary where declaratory judgment may be employed to resolve immigration litigation.

Discretion to refuse declaratory judgment is not unfettered. *Altvater* v. *Freeman*, 319 U. S. 359, 363. In the consideration of this problem the Supreme Court recently said:

> "The actuality of the plaintiffs' need for a declaration of his rights is therefore of decisive importance." *Eccles* v. *Peoples Bank*, 333 U. S. 426.

That there is a need for a declaration of respondent's rights herein is clear. Declaratory judgment will permit an adjudication of the legal relationships herein without requiring expense to the government and inconvenience to the alien which is attendant where he is detained pursuant to an order of deportation. Unlike habeas corpus which requires adjudication after an alien is detained, declaratory judgment will permit an adjudication prior to detention. If habeas corpus is the exclusive remedy herein, then there is

no way in which an alien can secure a judicial determination of his status without surrendering himself to the inconvenience and expense of detention while litigation is instituted and his rights determined.

> "Declaratory judgment procedure . . . may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action." *House Committee Report* 1946 p. 42; S. Doc. 248 79th Congress p. 276.
>
> See also: *Final Report of the Attorney General's Committee on Administrative Procedure,* Senate Document 8, 77th Congress 1st Session at p. 81.
>
> "The distinctive characteristic of the declaratory judgment is that it adjudicates the legal issues between the parties, without providing for the coercive action of execution or performance." *Duvall, supra.*

This is the very purpose of declaratory judgment which will be served herein.

5. *Irrelevant and Immaterial Considerations.*

Practical considerations, as alleged by the government should hardly require reversal or affirmance of the judgment below. (See Government's Brief, p. 56 *et seq.*). Approximately .01% of all deportation cases reach the courts each year. The burden of two or three hundred extra cases a year in the District of Columbia, is one which can easily be borne. If it is believed that these cases should be distributed throughout the land, such result may be accomplished legislatively. The denial of most writs of habeas corpus in deportation cases hardly indicates that they "may have been utilized solely for the purposes of delay." Courts are generally reluctant to override administrative action in cases involving aliens. The Government's conclusion that affirmance of the judgment below

will lead to many declaratory judgment actions in immigration cases "for the purpose of delaying deportation" (p. 60) is pure surmise and speculation which can have no influence in consideration of the questions here presented. Normally attorneys do not institute litigations except in good faith. Normally successive writs of habeas corpus are not sought. Normally, declaratory judgment will terminate litigation. Finally, the comparative rapidity of habeas corpus actions in deportation cases is somewhat exaggerated. These cases are usually defended by the local United States Attorney who communicates with the Criminal Division of the Department of Justice in Washington. The latter, in turn, seeks the file and a memorandum from the General Counsel of the Immigration Service. This roundabout procedure leads to long delays in most alien habeas corpus cases. Declaratory judgment cases can be expedited pursuant to Rule 57 of the Rules of Civil Procedure. Rarely will a judge refuse the Government's request to advance a cause under this rule.

## III

## Review Is Authorized Under the Administrative Procedure Act

Section 10 of the Administrative Procedure Act 5 U. S. C. 1009 authorizes judicial review except: (a) where a statute precludes it; or (b) where agency action is by law committed to agency discretion. Review may be sought by any person suffering legal wrong or adversely affected or aggrieved.

The legislative history of the Act indicates that review may be obtained in immigration matters. Thus in the House Committee Report (1946) at p. 41 (S. Doc. 248, 79th Cong., p. 275) it was said:

> "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon

its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide review is certainly no evidence of intent to withhold review."

See also: 92 Congressional Record 5654.

In *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2(d) 457 (C. C. A.-3), the majority of the court concluded that:

"The nub of the question seems to us to be whether these deportation proceedings are such as to fall within the first exception to section 10 as a proceeding provided by a statute which 'precludes judicial review.'

"Our conclusion is that the case does not fall within the exemption.' We are impressed by the fact that in spite of the basic statute's wording habeas corpus proceedings have always been available. Since they have been available the situation cannot be one where judicial review in the past has been precluded. In this we are supported, we think by the discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual."

Subsequently, the Third Circuit declared the action abated because of the failure to make timely substitution of the new Commissioner of Immigration. 168 F. 2(d) 1014. The opinion was not withdrawn and its reasoning and logic remain.

The principle of the *Trinler* case has been reaffirmed in the Third Circuit. *Podovinnikoff* v. *Miller*, 179 F. (2d) 937 (C. A. 3). It has been consistently followed in other jurisdictions. *Kristensen* v. *McGrath*, 179 F. (2d) 796 (C. A. D. C.); *Scholnick* v. *Clark*, 81 F. Supp. 298; *Eisler* v. *Clark*, 77 F. Supp. 610; *Camaratta* v. *Miller*, 79 F. Supp. 643. And usually, where the problem has been analyzed, approval has been given to the views expressed by the majority of the court in the *Trinler* case.

*The Impact of the Federal Administrative Procedure Act on Deportation Proceedings*, 49 Columbia Law Review (1949) 73, 80;

*Schwartz*, Administrative Finality and the Administrative Procedure Act, XVII, I. C. C. Practitioners Journal (1949) 32, 39;

61 *Harvard Law Review*, 1445 (1948);

*Scanlan*, Judicial Review under the Administrative Procedure Act, XXIII Notre Dame Lawyer (1948), 499, 520, 521;

*Orlow*, Deportation under the Administrative Procedure Act, 22 Temple Law Quarterly (1948) 74.

## IV

### Respondent Did Not Incur the Citizenship Bar of 50 U.S.C. App. 303-A and Is Eligible For American Citizenship

On the merits, we believe that the judgment below should be affirmed. Denmark was invaded by the Germans on April 9, 1940. United States Military Government Law No. 3 (for Germany) approved and enacted on November 15, 1944, includes Denmark in a list of "nations which are signatories of the United Nations Declaration dated January 1, 1942, *and nations associated with them in this war.*"

On March 30, 1942, when respondent filed D. S. S. 301 claiming exemption as a citizen of Denmark, he was not a citizen of a neutral country. Since the citizenship bar was visited under the Selective Service Act of 1940 (50 U. S. C. App. 303-a) only upon neutral aliens, the respondent was not subject to the said bar. *Petition of Ajlouny*, 77 F. Supp. 327.

### The Citizenship Bar of 50 U.S.C. App. 303-A Is No Longer Operative

By virtue of Section 16 of the Selective Service Act (P.L. 473, approved June 29, 1946), Section 3(a) of the Selective Training and Service Act of 1940 became inoperative on March 31, 1947. The Immigration Service realized

that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service*, November, 1947, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

*Interpretation 1 of the Immigration Service*, June 5, 1941;
*In re Carlson*, 730-P 2 59687, D.C. Ill. 1942;
*Petition of Otness*, 49 F. Supp. 220 N.D. Calif. 1943;
*Contra: In re Urmenta*, 42 F. Supp. 138 (D.C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

*United States* v. *Boisdore*, 8 How. 113;
*The Irresistible*, 7 Wheat. 551.

Congress, in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U. S. C. App., enacted June 29, 1946). Thus there can be no dispute but that Sec-

tion 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. "*Expressio unius est exclusio alterius.*"

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except those enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

*United States* v. *Reisinger*, 128 U. S. 398;
*Duke Power Co.* v. *S. C. Tax Comm.* (C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*United States* v. *Hark*, 320 U. S. 531.]

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of interest, forfeited under the statute while in force, was re-

instated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

Congress has altered the common law rule and provided that the "expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide . . ." (1 U. S. C. Supp. I, 109, 61 Stat. 633). Racial ineligibility to citizenship (8 U. S. C. 703) has, however, never been considered a "penalty, forfeiture or liability" as the terms are understood in legal parlance. Citizenship ineligibility under 50 U. S. C. App. 303-a has never been so designated judicially. Nor should it be so considered any more than racial ineligibility. Citizenship ineligibility and denial of naturalization have always been designated as the denial of a privilege. *United States* v. *Ginsberg*, 243 U. S. 472; *In re Martinez*, 73 F. Supp. 101, 105.

In *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2) reliance was placed upon an amendment to the immigration laws (8 U. S. C. 224-c; 59 Stat. 551, October 29, 1945) to establish the proposition that Congress had continued the citizenship bar of Section 303-a of the Selective Training and Service Act beyond March 31, 1947. Prior to October 29, 1945, it had been decided administratively that aliens who claimed exemption from the 1940 Selective Service Act and had become ineligible to citizenship, were nevertheless admissible to the United States for permanent residence. The Attorney General believed that this was an oversight of legislative draftsmanship and recommended that the immigration laws be corrected accordingly. No thought or consideration was then given to the expiration of 50 U. S. C.

App. 303-a.[4]. The assumption of the *Benzian* case that a correction of the immigration definitions contained in 8 U. S. C. 224-c, extended the provisions of the Selective Service Act or evinced an intention to do so, is unwarranted. In addition it should be noted that the *Benzian* cause was moot prior to decision in the District Court. (Memorandum of Solicitor General in the Supreme Court, No. 317, October Term, 1948, Certiorari denied, 335 U. S. 886). It is therefore not persuasive as a precedent.

The passage of Section 3(a) of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

[4] The legislative history of the 1945 amendment to 8 U.S.C. 224-c is reflected in the immigration file of Alvaro Valas, 56127/854. Counsel herein was then a member of the Board of Immigration Appeals and participated in that decision.

## Conclusion

Neither the immigration statute nor the traditional scope of review in deportation cases warrant a denial of the judgment sought herein. Declaratory judgments in immigration cases will prevent social misery and economic waste, and their use in deportation cases—proceedings which may result "in loss of both property and life; or of all that makes life worth living" should be encouraged.

The Court of Appeals correctly determined that the respondent's eligibility for American citizenship was a matter appropriate for declaratory judgment and it properly declared that the respondent was eligible.

Respectfully submitted,

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